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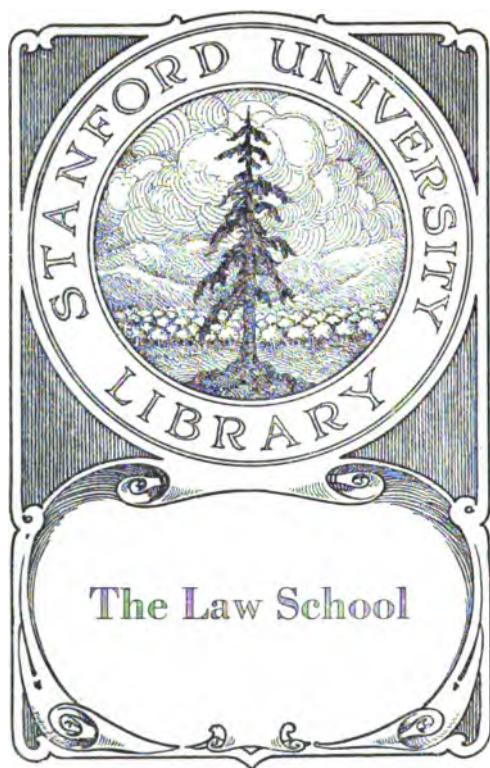
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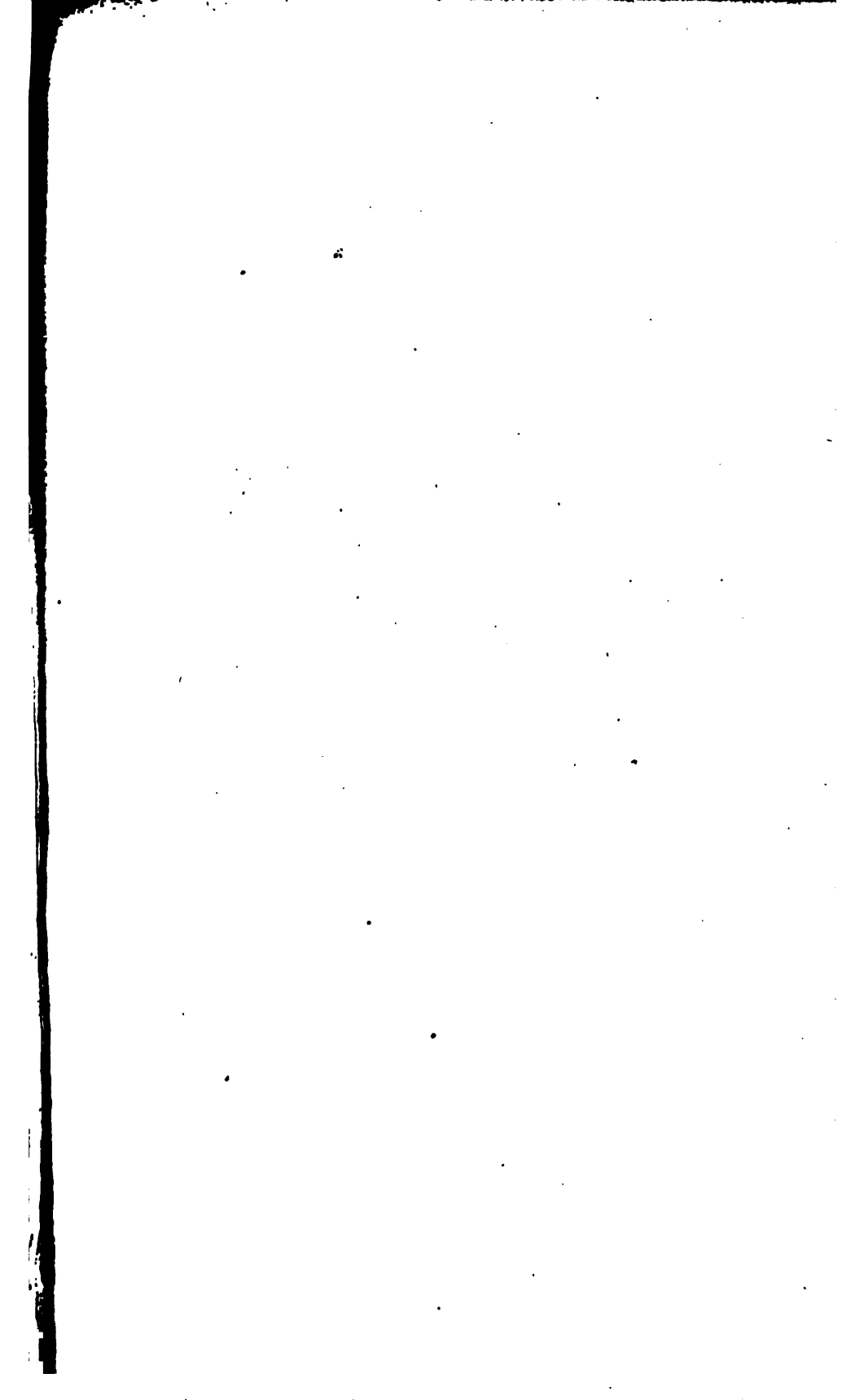
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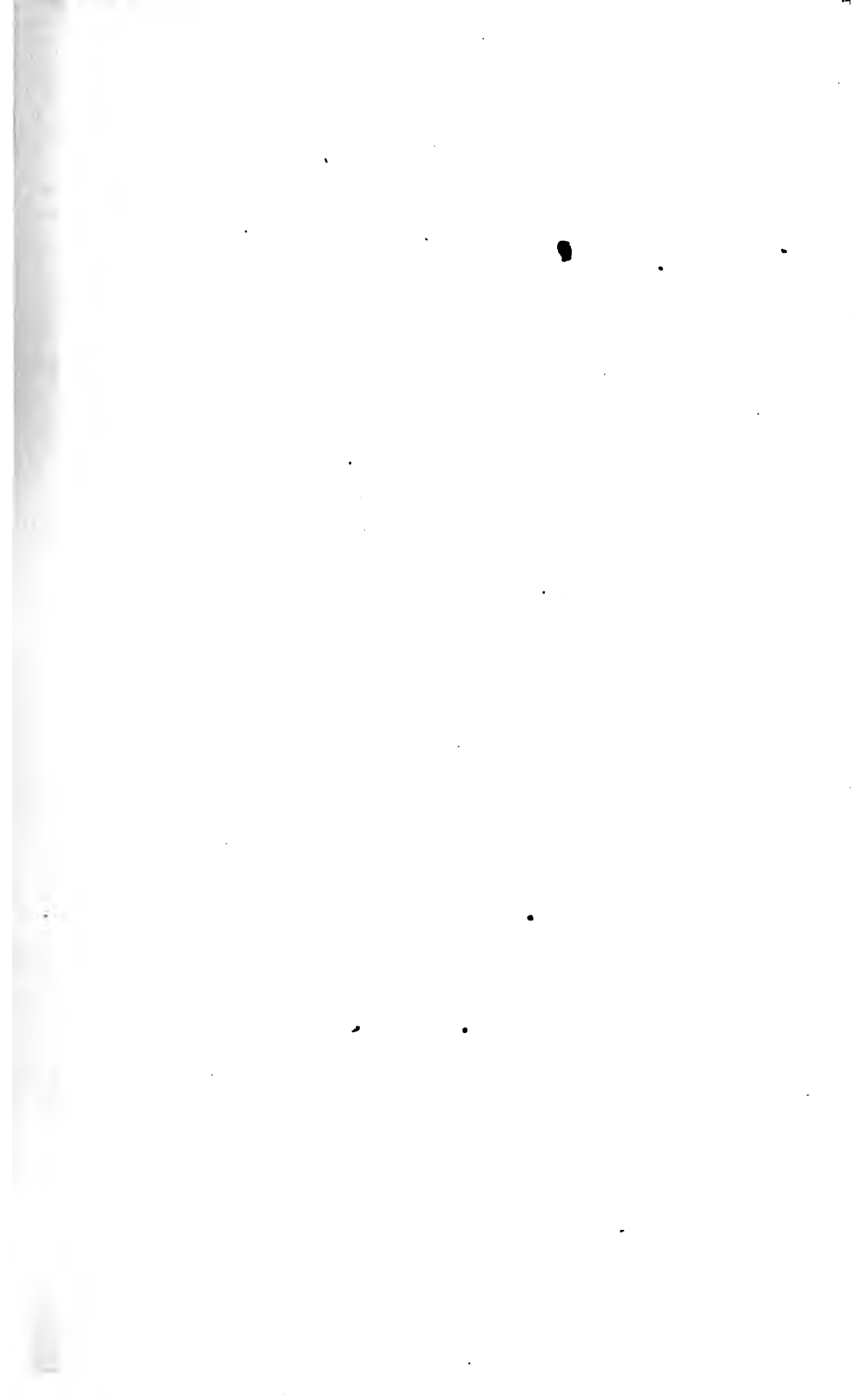
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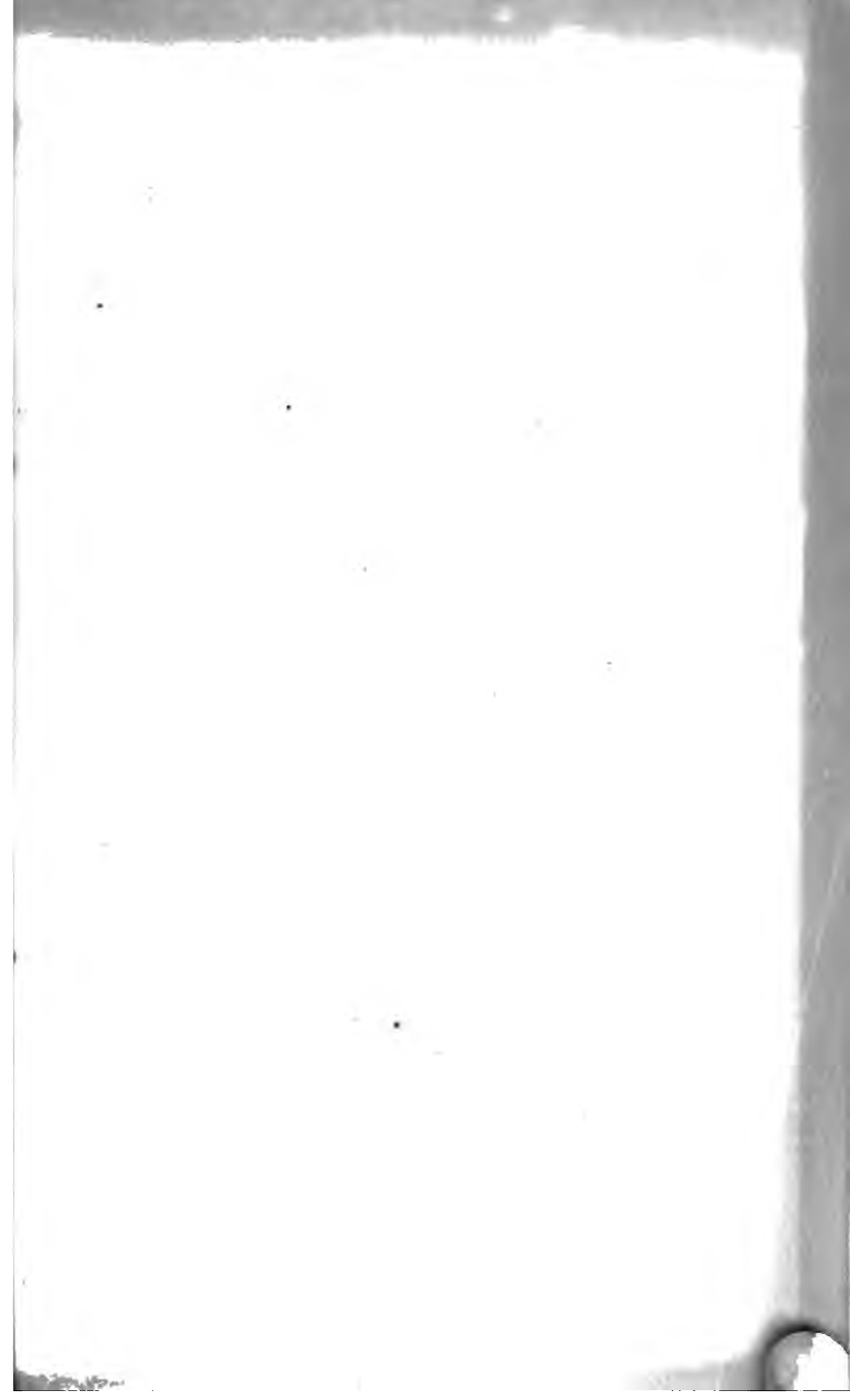
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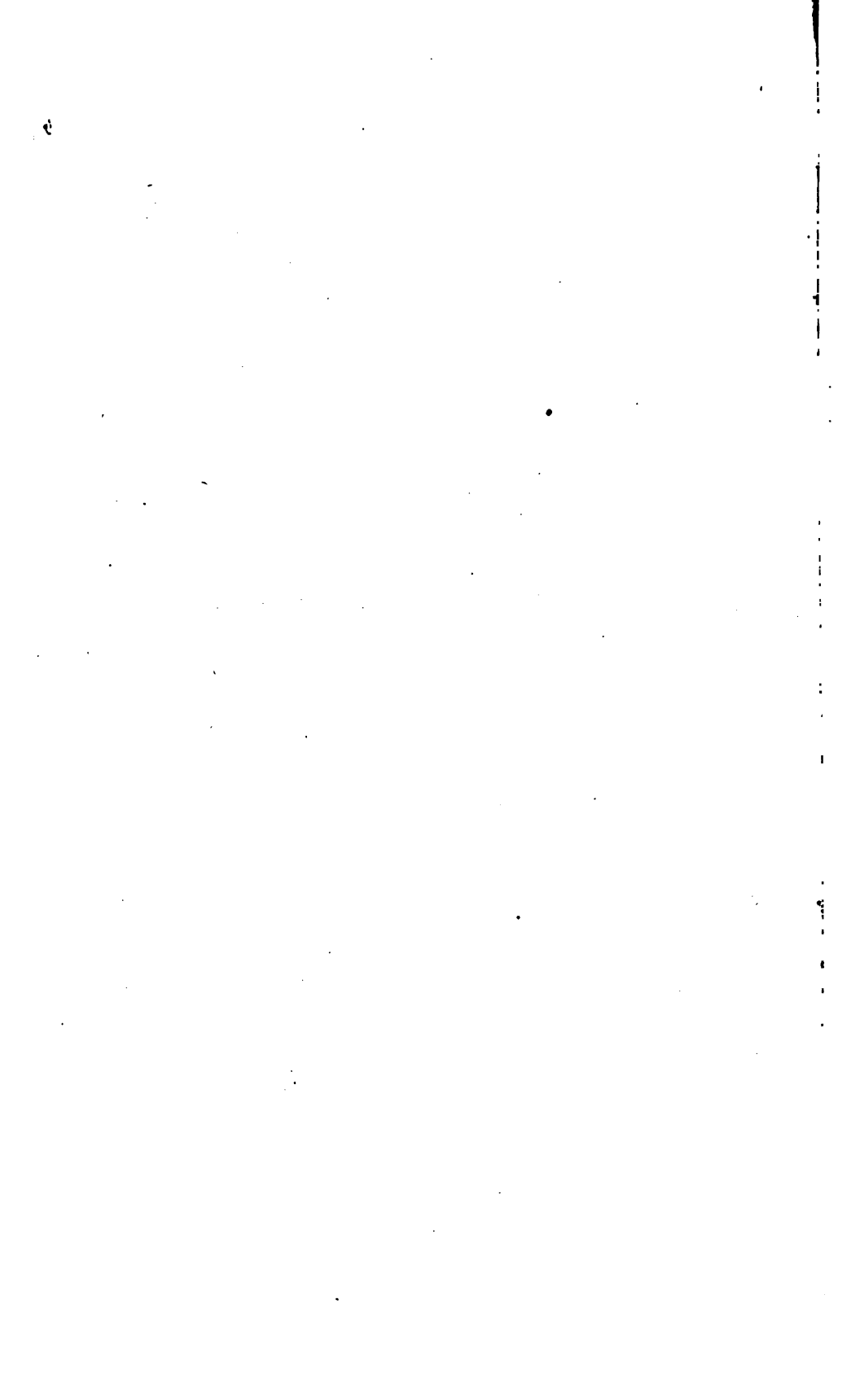
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REPORTS
OF
CASES DECIDED
BY THE
ENGLISH COURTS,
WITH
NOTES AND REFERENCES TO KINDRED CASES
AND AUTHORITIES.

BY
NATHANIEL C. MOAK,
Counsellor at Law.

VOLUME IX.

CONTAINING

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NAMES OF THE JUDGES
OF THE
SEVERAL COURTS IN ENGLAND,

During the time of the decision of the cases reported in the present volume.¹

QUEEN'S BENCH.

The Right Hon. Sir ALEXANDER JAMES EDMUND COCKBURN, Bart., Ch. J.
Sir COLIN BLACKBURN, Knt.
Sir JOHN MELLOR, Knt.
Sir ROBERT LUSH, Knt.
Sir RICHARD QUAIN, Knt.
Sir THOMAS DICKSON ARCHIBALD, Knt.²
Sir WILLIAM FIELD.³

COMMON PLEAS.

The Right Hon. Sir JOHN DUKE COLERIDGE
Sir HENRY SINGER KEATING, Knt.⁴
Sir WILLIAM BALIOL BRETT, Knt.
Sir ROBERT GROVE, Knt.
Sir GEORGE DENMAN, Knt.
Sir GEORGE ESSEX HONYMAN, Bart.⁵
Sir THOMAS DICKSON ARCHIBALD.⁶
Sir JOHN WALTER HUDDLESTON.⁶
Sir NATHANIEL LINDLEY.⁷

COURT OF EXCHEQUER.

The Right Hon. Sir FITZ ROY KELLY, Knt., C. B.
Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.
Sir GILLERY PIGOT, Knt.⁸

¹ The changes of judges in England have, as a matter of convenience, been brought down to the time of publication instead of ending with the past year. Some of the new judges may not have sat in any of the cases herein reported.

² On the resignation of Mr. Justice KEATING Mr. Justice ARCHIBALD was in February, 1875, transferred to the Common Pleas, to fill the vacancy.

³ WILLIAM FIELD, Q.C., was in February, 1875, appointed Judge of the Court of Queen's Bench, on the transfer of Mr. Justice ARCHIBALD to fill the vacancy occasioned by such transfer: 10 Law Jour., 90, 96.

⁴ Sir HENRY SINGER KEATING retired from the Bench February 1, 1875: 10 Law Jour., 90, 96.

⁵ Sir GEORGE ESSEX HONYMAN resigned February 20, 1875: 10 Law Jour., 143.

⁶ JOHN WALTER HUDDLESTON, Q.C., was appointed a judge of the Court of Common Pleas February 25, 1875, to fill the vacancy occasioned by the resignation of Mr. Justice HONYMAN: 10 Law Jour., 143. On the 12th day of May, 1875, he was transferred to the Court of Exchequer to fill the vacancy occasioned by the death of Sir GILLERY PIGOT: 10 Law Jour., 303.

⁷ NATHANIEL LINDLEY, Q.C., was appointed a judge of the Common Pleas May 12, 1875, to fill the vacancy occasioned by the transfer of Mr. Justice HUDDLESTON to the Court of Exchequer: 10 Law Jour., 303; 59 Law Times, 41.

⁸ Sir GILLERY PIGOT died April 23, 1875: 10 Law Jour., 293; 59 Law Times, 303.

NAMES OF THE JUDGES.

Sir ANTHONY CLEASBY, Knt.
 Sir CHARLES EDWARD POLLOCK, Knt.
 Sir RICHARD PAUL AMPHLETT.
 Sir JOHN WALTER HUDDLESTON,⁶

HIGH COURT OF CHANCERY.

Right Hon. LORD CAIRNS, Lord Chancellor.
 Right Hon. Sir WILLIAM MILBOURNE JAMES, } Lord Justices.
 Right Hon. Sir GEORGE MELLISH, }
 Hon. Sir RICHARD MALINS, } Vice Chancellors.
 Hon. Sir JAMES BACON, }
 Hon. Sir CHARLES HALL, }
 Right Hon. GEORGE JESSEL, Master of the Rolls.
 Hon. Sir JAMES BACON, Chief Judge in Bankruptcy.

HIGH COURT OF ADMIRALTY.

Right Hon. Sir ROBERT JOSEPH PHILLIMORE, Knt., D. C. L.

PROBATE AND DIVORCE.

Right Hon. Sir JAMES HANNEN, Knt.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

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 Lord Chancellor.
 Lord Justices of the Court of Appeal in Chancery.
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 Lord Chief Justice of the Common Pleas.
 Lord Chief Baron of the Court of Exchequer.
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THE MEMBERS USUALLY ATTENDING THE
COMMITTEE ARE :

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 Right Hon. Sir ROBERT JOSEPH PHILLIMORE.
 Right Hon. Sir JOSEPH NAPIER.
 Right Hon. Lord Justice JAMES.
 Right Hon. Lord Justice MELLISH.
 Sir BARNES PEACOCK.
 Sir MONTAGUE EDWARD SMITH.
 Sir ROBERT P. COLLIER.

The Prelates of the church of England, who are Privy Councillors, are members of the Judiciary Committee on Appeals to Her Majesty in Council under the church discipline act, but not otherwise.

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ADDENDA ET CORRIGENDA.

- Page 16, First column, 5th line from bottom. If the agent's name appears, without his principal's, in an agreement required by the Statute of Frauds to be in writing, the principal may nevertheless enforce the agreement against the other party signing it. *24 Ohio St. Rep.*, 28.
- Page 115, Column 2, Line 38. Where the assignee of a bond and mortgage had permitted the mortgagee to receive payments upon the mortgage; held that an omission on the part of the mortgagor to require a surrender of the bond and mortgage when completing the payments, did not raise a presumption of bad faith. *Van Keuren v. Corkins*, 6 N. Y. Supreme Ct. Rep., 355.
- Page 115, Line 18, First column. Where a special warranty of title is exacted by the grantee under such circumstances as imply knowledge that the property was held in trust, the grantee is not an innocent purchaser, entitled to hold against the beneficiary of the grantor. When the grantee has knowledge that the grantor was a director in a corporation, at the time he became the purchaser of a railroad belonging to the corporation, at a judicial sale thereof, such grantees are put upon inquiry as to the character of the title to the road thus acquired by such director. The grantee in such a case is not an innocent purchaser. *Covington, etc., v. Bowler*, 9 Bush (Ky.), 470.
- Page 225, Line 29, Second column. A servant was driving his master's horse on a street of a city faster than was permitted by the ordinance; he and the horse were taken into custody by the police, by negligence the horse escaped and was killed: Held, that the city was not responsible for the negligence of the police. *Elliott v. City of Philadelphia*, 75 Penn. St. R., 347.
- Page 475, Line 5, Column 1. Although an infant may recover for an injury where his parent was guilty of negligence contributing to the injury, the parent cannot. *Bellefontaine, etc., v. Snyder*, 24 Ohio St., 670.
- Page 557, Line 28, Column 1, add: but see *Fay v. Salem, etc.*, 111 Mass., 27.
- Page 557, Line 11, Column 2. A plea justifying the fouling of waters by chemicals used for the manufacture of paper must allege an user and acquiescence by the plaintiff, or those under whom he claims, for twenty years. *Gladfeller v. Walker*, 40 Maryland, 1; a very excellent case as to the rights of different riparian owners.
- Page 743, Line 40, Column 2. The testator gave his widow unlimited power to sell real estate by words, held not to create a precatory trust, and the widow during her lifetime sold a portion of the real estate and invested the proceeds in personal securities. Held, that in the absence of any directions as to the investment of the proceeds of sales, while giving her full power to sell, the testator must be taken to have intended to leave it to her discretion to convert the estate from real to personal, and *vice versa*, at her discretion; and that therefore the securities should be distributed as personal property. And if the proceeds of the sale of lands had been invested in other lands, the character of the former as ancestral estate would not pass to the latter. *Bristol v. Austin*, 40 Conn., 438.

APPEAL CASES

BEFORE THE

HOUSE OF LORDS.

ENGLISH AND IRISH APPEALS.

[Law Reports, 7 House of Lords, 12.]

April 20, 1874.

***THE DIRECTORS, &C. OF THE NORTH EASTERN RAIL- [12
WAY COMPANY, Appellants; and ROBERT WILLIAM WAN-
LESS, Respondent.**

Railway—Level Crossings—Negligence.

Where a railway crosses a public highway on the level, and there are (under the 8 Vict. c. 20, s. 47) gates for the protection of "horses, cattle, carts, or carriages," passing along the highway, it is the duty of the railway company's servants to keep them closed when any train is approaching. If this duty is not performed, and a passenger along the highway is, in attempting to cross the line of railway, injured, the leaving of the gates open is, in an action brought by him, evidence of negligence to go to the jury. It is so, even though, with care and circumspection, he might have been able to see, at a distance, the approach of the train which occasioned the injury.

Per THE LORD CHANCELLOR (Lord Cairns): The gates of the railway, at a place where it crossed the highway at a level, being open, amounted to a statement, and a notice to the public, that the line, at that time, was safe for crossing. (See *Bridges v. The North London Railway Company, post.*)

This was an appeal pursuant to the Common Law Procedure Act, 1854, against a decision of the Court of Exchequer Chamber, which had confirmed a previous decision of the Court of Queen's Bench discharging a rule for a new trial (¹). The action was brought by the plaintiff for compensation in damages for an injury inflicted on him through the negligence of the company's servants. The declaration was in the usual form. The first count alleged that the defendants, by their servants, so negligently and unskilfully managed an engine and carriages on a certain railway while the plaintiff was then lawfully crossing, that he was injured. The second count described the defendants as a railway company subject to the provisions contained in the Railways Clauses Consolidation Act as to level crossings; that the defendants' railway crossed a certain highway on a level; that the highway and crossing were protected by gates subject to the

(¹) 1 Law Rep., 6 Q. B., 481.

1874

Directors, &c. of North Eastern Railway Co. v. Wanless.

control of the defendants; yet that they were guilty of negligence in running a train across the highway and crossing, and in not providing for the safety of persons using the said level crossing, whereby the plaintiff who was then [13] lawfully using the said highway and crossing by the invitation of the defendants, was injured, &c. The defendants pleaded not guilty; that the servants were not the servants of the defendants; and that the plaintiff was not crossing by the invitation of the defendants.

The cause was tried before Mr. Justice Brett, at Durham, in the spring of 1869, when it appeared that on the Pensher branch of the North Eastern Railway, there was, near Hylton, a spot at which the railway crossed a public highway on the level. There were the proper carriage gates, and there was also on each side of the railway a gate for foot passengers. The south side of the railway is called the up-line, the north, the down-line. The number of coal trucks daily passing there is very considerable. On the 27th of April, 1868, the plaintiff, in company with three other boys, came along the road on the north side of the railway to cross over the line by the level crossing. The evidence as to how the boys got on the line, whether through the carriage or the foot-passenger gate, was contradictory. A train of forty-eight empty coal-trucks, was coming on the up, or south side of the line, from Sunderland to Pensher, and it passed through the Hylton station without stopping. The boys had with them a dog, and persons who were on the north, or down side of the line, shouted to the boys to keep the dog from running among the trucks. This train passed, and when it had done so the plaintiff advanced to cross the line, and was instantly knocked down by a train passing on the north, or down side, of the line, the side on which the boys had been standing. For the company, evidence was given that the plaintiff might have seen this train at the distance of half a mile; but on the part of the plaintiff it was stated that the distance between the carriage-gate on the north side and the line itself, is about twelve feet, and that the boys could not on that side see the approaching train till they were seven or eight feet within the gate on the north side. The rules and regulations of the company on this subject were put in evidence. Rule 174 was in these terms: "Unless a written order to the contrary be given by the engineer, the gates shall be kept shut across the carriage roads except when required to be opened to allow the railway to be crossed." Rule 175: "When the railway is required to be crossed, the gatekeeper shall, before opening the gates,

satisfy himself that no engine is in sight, he shall then show his danger signals, and keep them *exhibited until the [14 line is clear, when he shall close the gates and alter the signals." It did not appear that any signal was exhibited; and on the question whether the carriage-gate on the north side was or was not open, the evidence was contradictory.

It was contended for the company that there was no evidence of negligence to go to the jury. The learned judge, however, held that there was, and left the case to the jury, who found a verdict for the plaintiff, damages, £100. Leave was reserved to the defendants to move. A rule was accordingly obtained to enter a nonsuit on the ground that there was no evidence of negligence, or to have a new trial on the ground that the verdict was against the weight of the evidence. This rule was discharged; and on appeal to the Exchequer Chamber that decision was affirmed. This appeal was then brought.

Mr. *Manisty*, Q.C., and Mr. *Kemplay*, Q.C., for the company: There is nothing here to show that there was any want of reasonable care on the part of the company's servants. The mischief arose from the negligence of the boy himself. He received no invitation to come on the line; the gates were closed, and no one could exactly say how he got on the line. The duty cast upon the company by the statute, and by the rules framed in consequence of it, refer only to the passing of animals, cattle, carts, and carriages. Foot-passengers are not mentioned in the section; they can always provide for their own safety if they will use reasonable care. The plaintiff here might have done so. He was warned about the danger to his dog; he knew, therefore, that caution was necessary; he did not act with reasonable caution; he stayed till one train had passed by, and then, without taking any trouble to look whether another was coming, which he might have seen if he had looked, he advanced on the line and was injured. That injury was altogether the result of his own negligence, and there was no evidence to go to the jury that the company's servants had been guilty of any negligence at all. Even if the gates had been left open, that did not constitute an invitation to the plaintiff to come on the line; and there was no evidence to show how he came there, or that he came through the carriage-gates at all; and it was those gates that were the special subject of provision in the section of the statute.

*Mr. *Charles Russell*, Q.C., Mr. *R. G. Williams*, [15 Q.C., and Mr. *W. Lewers*, for the respondent in the appeal, were not called on.

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Directors, &c. of North Eastern Railway Co. v. Wanless.

The LORD CHANCELLOR (Lord Cairns): My Lords, the very able counsel who has opened this appeal before your lordships is one from whom your lordships are always in the habit of hearing everything which can fairly and properly be urged in support of any case in which he appears as advocate; but it is not within the power of learned counsel to present a case with a stress which the case itself does not possess; and I myself am not surprised that he has found it impossible to urge this case more strongly than he has been able to do. In point of fact, my lords, I must express my surprise at the appellants here, finding it to be for their interest, or thinking it desirable, in any way, to bring this case before your lordships' consideration. The stake involved in the case itself is very small—probably of no importance as compared with the costs of the litigation. As regards the general effect of the bearing of your lordships' decision upon the conduct of railway companies in future, I cannot conceive that the effect of the decision can be otherwise than wholesome; for it can only lead, as has been remarked in the course of the argument, to their properly performing the duty which the law has already cast upon them, namely, keeping closed the gates of the railway at level crossings at those times at which it would be dangerous to allow the public to cross the line.

The only question raised in the case for your lordships' determination is, whether there was here evidence of negligence to go to the jury? What the jurors should do upon the evidence, or whether they should find any damages or not, was a question for the jury, and is not for this house now to consider.

My lords, the facts of the case have been stated so recently, that I do not think it necessary to repeat them. It appears to me that the circumstance that the gates at this level crossing were open at this particular time, amounted to a statement, and a notice to the public, that the line at that time was safe for crossing, and that any person who, under those circumstances, went inside the gates, with the view of crossing the line, might very well have been supposed by a jury to have been influenced by the circumstance that the gates [16] were open. Then, when inside the gates, *the boy who in this case was injured, saw what was inconsistent with the gates being open, namely, he saw one train passing, and it may very possibly be the case that that circumstance embarrassed him, and that his eyes and attention being fixed upon that particular train, when it passed out of the way he failed to see the other train. He appears not to have seen it,

but attempted to cross the line, and was knocked down and injured. It is quite clear he might have seen the other train—there is no doubt about that—but the result of the state of facts only comes to this, that being brought upon the line through the circumstance of the gate being open, he was placed in a position which was more or less embarrassing, and he did not use his faculties so clearly as he might have done under other circumstances.

My lords, the question is, might not a jury fairly consider that his being there at all was owing to the negligence of the railway company? It appears to me that there was evidence to go to the jury to which weight might have been given, and from which the jurors might have been led to conclude that he was there in consequence of the circumstance I have referred to, viz., the gates being open; and that being the only point for the court to consider, I certainly am of opinion that the court could not do otherwise than hold that the question of negligence might upon this evidence rightfully be submitted to the consideration of the jury.

I therefore move your lordships that the judgment of the Exchequer Chamber and of the primary court be affirmed, and that this appeal be dismissed with costs.

LORD CHELMSFORD and LORD SELBORNE concurred.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Lords' Journals, 20th April, 1874.

Attorneys for the appellants: *Williamson, Hill & Co.*

Attorney for the respondent: *John Scott.*

[Law Reports, 7 House of Lords, 17.]

May 5, 1874.

*THOMAS LAKEMAN, Appellant; and J. P. MOUNT-STEPHEN, Respondent. [17]

Promise to pay—Statute of Frauds.

A board of health had been formed in a town. L. was its chairman. M., a contractor, had, under the orders of the board, formed a main sewer in the town, and, under the orders of the board, had purchased pipes which would be required to be used in making the connecting drains between certain private houses and the main sewer. The board had, under the 11 & 12 Vict. c. 63, s. 69, given notice to the inhabitants of certain streets to make these connecting drains, the effect of the notice being that if the said inhabitants did not make those connecting drains the board might make them and charge the expenses on the defaulting inhabitants. The notice was disregarded. No subsequent resolution was passed by the board. M. was about to take away his carts and working materials, when L. said to him, "What objec-

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tion have you to making the connections?" to which M. answered, "None, if you or the board will order the work, or become responsible for the payment;" and L. replied, "M., go on and do the work, and I will see you paid." M. did the work, and, the board refusing to pay, sued L. for the amount:

Held, that the words of L. were properly left to the jury as evidence to sustain a claim against him personally, and that they did not constitute a promise to pay the debt of another, so as to come within the operation of the Statute of Frauds.

Per LORD SELBORNE: There can be no suretyship unless there be a principal debtor, existing at the time, or constituted by matters *ex post facto*.

THIS was an appeal against a judgment by the Court of Exchequer Chamber, which had reversed a previous judgment of the Court of Queen's Bench. The case has already been fully reported in the courts below⁽¹⁾. The following is a summary of the facts: Lakeman was the chairman of the Board of Health of the town of Brixham. Mountstephen was a builder and contractor at Torquay, and had often executed works for the board. He had in the early part of 1866 completed for the board a main sewer for the town, and the board had directed him to make a purchase of pipes, and had given notice under the 11 & 12 Vict. c. 63, s. 69 (the Public Health Act of 1848) to the owners of certain [18] houses *near this main sewer to connect the drains of their houses with it, or that the board would make the connections at their expense. These persons had not obeyed the notice, and the board therefore possessed the power to make the connections and to charge the inhabitants, to whom notice had thus been given, with the cost thereof. The board, however, had not passed any resolution so to do. Adams, the surveyor of the board, had proposed to Mountstephen to construct these connections. The latter did not do so, as he had no orders from the board. On the 5th of April, 1866 (which was before the expiration of the notice given to the householders), according to Mountstephen's evidence, he, after finishing the main sewer, was about to take away his carts and building materials, when, after some talk with Adams, a conversation ensued between him and Lakeman. The latter said, "What objection have you to making the connections?" Mountstephen answered, "None, if you or the board will order the work or become responsible for the payment," to which Lakeman replied, "Go on, Mountstephen, and do the work, and I will see you paid." Mountstephen did the work, but the board, alleging that no orders had been given for the work, declined to pay for it. Mountstephen then brought an action against Lakeman for the amount due for the work.

The declaration contained three counts. The first stated

(1) Law Rep., 5 Q. B., 613; Ibid., 7 Q. B., 196.

that the defendant was the chairman of the board, and that in consideration that the plaintiff would do and provide certain work and materials for the board at the request of the defendant, as and assuming to be agent for the board, the defendant promised the plaintiff that he was authorized by the board to make the request; that the plaintiff, relying on the defendant's promise, did the work; breach, that the defendant was not so authorized.

The second count stated that the defendant, being such chairman, in consideration that the plaintiff would do and provide work and materials for the board, at the request of the defendant, the defendant promised to obtain for the plaintiff from the board a contract whereby the board should be legally bound: breach, that the defendant did not obtain such contract. The third count was for work and materials done and supplied by the plaintiff to the defendant at his request.

The defendant pleaded, 1, to the first and second counts, that *the defendant did not promise as alleged; 2, that [19 the plaintiff did not do the work for the board at the defendant's request; and '3, never indebted.

The cause was tried before Lord Chief Baron Kelly at the Devon Summer Assizes, 1870, when, by the permission of the learned judge, a count was added alleging that the defendant promised that in consideration that the plaintiff would do the work for the board, the defendant promised to pay for the work if the board should at any time refuse to pay.

At the close of the plaintiff's case the defendant's counsel submitted that, on the declaration and the evidence (as it then stood), there must be a nonsuit. The learned judge declined to nonsuit, being of opinion that there was evidence to go to the jury, and he gave leave to the plaintiff to add the count as above stated. The defendant's case was then entered on, when the statement of the conversation, as detailed in plaintiff's evidence, was denied. At the close of the case the Lord Chief Baron left it to the jury to say whether the conversation, as deposed to by the plaintiff, but denied by the defendant, had taken place. The jury returned a verdict for the plaintiff for £287, and leave was then reserved to the defendant to move to set aside this verdict and enter a nonsuit, if the court should be of opinion that there was no evidence, either upon the original or amended declaration, which ought to have been left to the jury. A rule for that purpose was obtained and was made

absolute⁽¹⁾, the court being of opinion that, coupling the expressions used with the conduct and position of the parties, the defendant's words did not amount to an engagement to be primarily liable for the work, but only to a promise that if the plaintiff would do the work on the credit of the board the defendant would pay if the board did not; and that this was a promise to be answerable for the debt of another within sect. 4 of the Statute of Frauds, though in fact the board had never been indebted, and as this promise was not in writing it could not be enforced.

On appeal to the Exchequer Chamber this decision was reversed, that court being of opinion that there was evidence to *go to the jury on the question whether the defendant had not by his words made himself primarily liable⁽²⁾.

This appeal was then brought.

Mr. *Cole*, Q.C., and Mr. *Francis Pinder*, for the appellant, insisted that this was a promise to pay the debt of another, and, not being in writing, was void under the Statute of Frauds; that it was a contract of guarantee only, for that there was enough to show that the board required the work to be done, and that there was no evidence under either the original or the amended declaration to go to the jury showing that the defendant had in any way made himself primarily responsible for the work, but that the words themselves proved that the defendant meant, and the plaintiff must so have understood them, that if the plaintiff would do the work for the board the defendant would see that he got paid.

Mr. *Lopes*, Q.C., and Mr. *Arthur Charles*, for the respondent, were not called on.

The LORD CHANCELLOR (Lord Cairns): My lords, the question, and the only question, which your lordships are called upon in this appeal to decide is, whether there was or was not evidence of an original liability on the part of the defendant to pay the plaintiff in the action for the work to be done. I begin by pointing out to your lordships that that is the question, and the only question in the action, for the purpose of reminding you that we are not embarrassed here by any consideration as to whether the precise sum for which the verdict of the jury was returned, is the sum which ought to have been assessed as the amount to be paid in the action. Whatever questions might have been raised, whatever distinctions might have been made as to different items of the demand, this is not the time or the place for making

(¹) Law Rep., 5 Q. B., 613.

(²) Law Rep., 7 Q. B., 196.

them. If it was desired to make them, and if there was room for making them (which I am far from saying there was not), it ought to have been done at an earlier stage in these proceedings.

My lords, taking the question raised by the rule which was *obtained in the first instance, whether there was [21 or was not evidence of an original liability on the part of the defendant to pay the plaintiff for the work to be done, I may remind your lordships that that question falls to be determined really upon the consideration of the evidence of the plaintiff in the action himself. It is true that another witness was called on behalf of the plaintiff, but his evidence on this subject is quite immaterial, and we have the evidence of the plaintiff only to deal with. My lords, that evidence might have been accepted by the jurymen or it might have been rejected; they might have been so satisfied with the evidence adduced on the other side as to lead them to disbelieve the evidence of the plaintiff, but the question, I repeat, is, whether or not in this case the learned judge would have been right in directing a nonsuit on the ground that there was no substantial evidence to go to the jury.

Now I will call your lordships' attention, for a few moments, to what the plaintiff really did say, because, I think, if the two portions of his evidence, which at first sight appear rather disconnected, are brought into their proper order, a very clear and intelligible account of the origin of this contract will be given. The plaintiff says in his cross-examination, referring to the 19th of March and to the resolution of the board of that date, "that notices should be served by the board," that is, notices upon the owners of houses who were to be required to connect their drainage with the main drainage of the town; "I knew nothing of this." And then, at another part, "Adams asked me if I would procure 1,300 feet of pipes, and if I would do the work." He was asked two things; if he would procure the materials, and if he would do the work. "I said 'not unless the board would be responsible for the payment, for I would not take orders from the owners of the property.' I know they must have notices before they are liable. I think it is twenty-one days notice." Then a resolution of the board was put in "for notice to owners and occupiers, and that Mountstephen procure 1,300 feet of pipes." That appears to have been communicated to him, as I gather from the next portion of his evidence, for he continues, "I proceeded then according to that order, but I refused

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to do the work unless the board would make themselves responsible."

22] *I understand that as being a very clear statement; it may be accurate or inaccurate, that is another question; but it is a very clear statement by the plaintiff, that he had his attention called to the danger of proceeding in these cases without a distinct formal authority from a board, like the local board in this case, and that in the first instance he would neither procure materials nor do the work without the order of the board; that he got from the board a proper order with which he was satisfied with regard to the materials. He may have been right or wrong in thinking it a proper order, but he was satisfied with it; but he had no order of the board with regard to the work to be done, and he refused, therefore, to do that work.

Then, turning to another part of the evidence, we have from him an account of a conversation which took place between him and Mr. Lakeman, the appellant, which must have been some days afterwards. He had finished some works connected with the main drainage, and he says: "We had just finished everything." Lakeman (the defendant) said: "What objection have you to make these connections?" From which I should infer that Adams had told Lakeman that although the materials had been supplied, there was an objection to doing the work, "meaning the laying down of the junction pipes. I said: 'I have no objection to do the work, if you or the local board will give me the order.' He" (that is Mr. Lakeman) "was chairman of the Local Board of Health for Brixham. He said: 'Mountstephen, you go on and do the work, and I will see you paid.'"

Your lordships have had very ingenious arguments addressed to you, putting various constructions upon these few words. It has been suggested that the effect of these words was that Mountstephen must be taken to have asked Mr. Lakeman first for an order from the board, and to have been satisfied that he, as chairman of the board, could then and there give the order, and to have had through him then and there an order from the board, and yet that, not being satisfied with that order then and there thus obtained, he desired to superadd, and he had superadded to it, a virtual guarantee by Lakeman that he, personally, would guarantee that the board would pay the money. My lords, I must say that that does appear to me to be a most strange and 23] violent construction *placed upon a few simple words. As it appears to me, a very natural meaning (and it is quite

sufficient for the present purpose) of these words is this, that Mountstephen following up that course of action which he had previously pursued with Adams, stated to Lakeman that the reason why he refused to do the work was, that he had got no order from the board to do it, that he would do the work if he had a formal order from the board, or if he had a personal order from Lakeman himself, and that thereupon Mr. Lakeman—who for some reason, the stringency of which it is not for your lordships now to inquire into, wished the work to be immediately done—that thereupon Mr. Lakeman said: “You go on and do the work; do not concern yourself upon the subject of whether you have an order from the board, or have not such an order. You go on and do the work, and I will be your paymaster. I will see you paid.” Now, my lords, if that is the meaning of these words, and it appears to me certainly to be the *prima facie* and natural meaning of the words, I think there was ample and strong evidence to go to the jury that the go-by was entirely given to the question of an order of the local board, and that Mr. Lakeman stepped in and undertook himself, as a matter of primary liability, to pay for the work that would be done. Against that primary liability he might afterwards, as chairman of the board, have sheltered himself by obtaining from the board the consent to make a formal order, and acting upon and paying under that formal order. But that was for him to consider; he did that which the contractor required to be done—he put the contractor in the position of having then and there an absolute contract made—and the only contract which then and there absolutely could be made, would be a personal and primary contract by him to pay the contractor for the work to be done. My lords, it appears to me that there was clearly substantial evidence in the case to go to the jury, and that any judge who had to try this case would have miscarried, if upon this evidence he had held that there was no case to go to the jury.

I shall, therefore, submit to your lordships that the decision of the Court of Exchequer Chamber is correct, and that this appeal should be dismissed.

*LORD HATHERLEY: My lords, I entirely concur [24 with my noble and learned friend on the woolsack, and I look upon the case exactly in the same way as he does, namely, that there is contained in the conversation which is deposed to by the plaintiff evidence sufficient for the jurors, if they thought fit to act upon it.

LORD O'HAGAN: My lords, I am of the same opinion as

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the noble and learned lords who have preceded me, and substantially for the same reasons.

It is enough to say that, in my mind, there was ample evidence to go to the jury, and upon which the verdict of the jury could properly be pronounced. I think it right to say that our judgment does not in the slightest degree fritter away the Statute of Frauds, or weaken any substantial principle of law. It proceeds merely upon the ground that there was evidence to go to the jury. It is upon that ground that I understand the house to say that this appeal must be dismissed.

LORD SELBORNE: My lords, I am of the same opinion.

There are some observations in the opinions of the learned judges in the Court of Queen's Bench which certainly do look at first sight as if some of those learned judges thought that there might be a valid contract of suretyship, or a secondary liability upon the principle of a guarantee for the debt of some one else, to which the law relative to that description of contracts would apply, although there might be in truth no principal debtor. If that was the view of the learned judges, with all respect to them, I must confess myself unable to follow it. There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters *ex post facto*, and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt [25] of some other person to be *guaranteed. The tendency, therefore, of any view of this contract which would place it in the position of a guarantee for a future liability to be undertaken by the local board, would be absolutely to defeat the whole purpose of the communication, which was to remove a difficulty then pressing upon the mind of the contractor, as to whether or not he had sufficient authority from any one to go on with the work; and the answer was given in terms *de presenti* for the express purpose of inducing him at once to go on.

The next construction suggested was one which would make it fulfil, as has been said by my noble and learned friend on the woolsack, the double office of an order given by the chairman on behalf of the board, to do the work, and a personal guarantee for the liability of the board so engaged in by the chairman on their behalf. Upon that view, which is certainly put as a possible construction of this conversation by Mr. Justice Blackburn, I cannot but observe that the argument founded upon it seems to me to be *felo de se*; because, if I

rightly understand the law laid down in the case of *Cherry v. The Colonial Bank of Australasia* (') the necessary result of such a construction of the words would be, to make the defendant liable upon the first count in this declaration. The words so used, if that was the sense in which they were understood and intended by both parties, would have been in no degree less strong, for that purpose, than the words which were held to be a warranty of authority in the case of *Cherry v. The Colonial Bank of Australasia* ('). There two directors signed a paper in these words: "Sir, we have to inform you that we, as directors of the company," naming it, "have appointed Mr. Clarke to be legal manager of the company, and have authorized him to draw checks upon the account of the company." They had not *per se*, by the constitution of the company, power to give that authority; and they did not take the necessary steps to get it from the company. Those words, though expressly saying that they had done this as directors, were held to be a representation, making themselves personally liable, that they possessed the authority which they did not possess. And if the first words of this conversation could properly have been held to bear the construction suggested by Mr. Justice Blackburn, then, unless the board had been really *and [26 truly liable, which I do not collect to have been the view of any one of the learned judges in the Court of Queen's Bench, I apprehend that the verdict of the jury would still have been right, and the case could not have been withdrawn from the jury, because, in that view, the evidence would have been strong in support of the first count of the declaration.

It has been argued at your lordships' bar by Mr. Pinder, feeling, no doubt, the force of that view, that there is matter upon this evidence—and I suppose it must be upon the plaintiff's evidence—from which your lordships ought to conclude that the board was actually liable. My lords, I must say I cannot see a particle of evidence which justifies any such argument; and it does not appear to me that in either of the courts below any learned judge thought that there was any such evidence.

Judgment of Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Lords' Journals, 5th May, 1874.

Attorneys for the appellant: *Church, Sons & Clarke.*

Attorney for the respondent: *G. E. Philbrick.*

(') Law Rep., 3 Priv. C., 24.

A known public officer or agent is not personally liable upon a contract made by him as such, unless he expressly contracts to become so liable, or unless it appears that the credit was given to, or the labor performed for, the agent himself and on his agreement and promise to pay; or the fact of his being a public agent was unknown, and not disclosed at the time of making the contract. *Nichols v. Moody*, 23 Barb., 611; *Perrin v. Lyman*, 10 Am. Law Reg. N. S. 188, S. C. 32 Ind., 16; *Sheffield v. Watson*, 8 Caines, 69, and see note to 3d ed., p. 73, and numerous cases cited; *Osborne v. Kerr*, 12 Wend., 179; *Prosser v. Allen*, Gow. N. P., 117; 1 Story on Cont. (6th ed.), §§ 250, 254, 256; 1 Parsons on Cont., 123-126 marg. p., 5th ed.; 1 Chit. Cont. (11th Am. ed.), 386-388; *Addison* Cont. (6th Eng. ed.), 622, 626, 628, 726.

A distinction exists between public agents and those of a private character, in respect to their personal liability. *Nichols v. Moody*, 22 Barb., 611.

Ordinarily an agent contracting on behalf of the government, or of the public, is not personally bound by such contract because it is not to be presumed, either that a public agent intends to bind himself personally, or that a party contracting with him in his public character, means to rely on his individual responsibility. *Nichols v. Moody*, 22 Barb., 611.

A collector of customs of the United States government is not, in the absence of an express promise to pay, liable for the wages of a person employed by him as night watch and carman. *Nichols v. Moody*, 22 Barb., 611; *Perrin v. Lyman*, 32 Ind., 16; S. C., 10 Am. Law Reg., N. S., 188.

The question is whether the articles were sold on the personal credit of the officer. *Prosser v. Allen*, Gow's N. P., 117. *Williams v. Harbaugh*, Tappan, 24.

Upon this ground it was a question in the principal case whether the officer became personally bound.

If the members of the Common Council of a city, in passing an ordinance and letting a contract for the improvement of a street, act in good faith, under a misapprehension, they and the contractor, as well as the adjacent owner of real estate, believing the street to be within the corporate limits of the city, the contractor having like

knowledge with the Common Council, they cannot be held liable for the cost of such improvement, though the place where the same is made is not within the corporate limits. *Newman v. Sylvester*, 42 Ind., 106.

So where one contracts with a private agent, knowing the facts as to his assumed authority. *Aspinwall v. Torrance*, 1 Lansing, 386.

A public officer who acts without authority, or exceeds his authority, is liable, as is a private agent, on the contract made, or for the act done without or in excess of his authority. *Richardson v. Crandall*, 47 Barb., 335, affirmed 48 N. Y., 348, reversing S. C. 30 How. Prac., 184; *Bush v. Cole*, 28 N. Y., 261; *White v. Madison, etc.*, 26 N. Y., 117; *Cherry v. McDougal*, L. R., 3 Privy Council Cas., 24.

But see *Beattie v. Lord Ebury*, 3 Eng. Rep., 625, modified, post.

Unless the party with whom he contracts knows or is bound to know the facts relative to his authority. *Newman v. Sylvester*, 42 Ind., 106.

But see *Beattie v. Lord Ebury*, 3 Eng. Rep. 625, modified, post p.—

And the ratification by the principal will not relieve him from such liability to the injured party. *Richardson v. Crandall*, 47 Barb., 335, affirmed 48 N. Y., 348.

When, therefore, such an agent exacts a pledge of property without authority of the government, and an action is brought by the pledgor, to recover it back, while it is in the possession of such agent, he is liable for such property; and even the adoption of the act by the principal will not shield him from liability. *Richardson v. Crandall*, 47 Barb., 335, affirmed 48 N. Y., 348.

If a party contracts as a public officer, and in that capacity acts honestly, he will not ordinarily be personally liable. If his authority to act is defined by public statute, all who contract with him will be presumed to know the extent of his authority, and cannot allege their ignorance as a ground for charging him with acting in excess of such authority, unless he knowingly mislead the other party. *Newman v. Sylvester*, 42 Ind., 106.

If a committee, authorized by a vote of the town to effect a working of a definitely located road, make a contract

with J. S. for him to build a section of it, and acting and being understood to act only as agents, point out to him an erroneous location of his section, upon which he proceeds to work, supposing it to be the true location, he cannot maintain an action of contract against them personally for this work, if it was not done or ordered for their personal use or benefit. *Nyckerson v. Dyer et al.*, 105 Mass., 320.

If the contract on its face purports to be by the officer or agent individually, he is so liable although he add "agent," etc., to his signature; and such words are mere words of description. *De Witt v. Walton*, 9 N. Y. Rep., 571; *Brinckerhoff v. Phelps*, 42 Barb., 469, affirmed 40 N. Y., 59; *Babbitt v. Young*, 51 N. Y., 238; *Gray v. Case*, 51 Missouri, 463; *Oubard v. Benninger*, 51 N. Y., 652; *Hall v. Bradbury*, 40 Conn., 32; *Linedly v. Crandell*, 21 Wend., 101; *Auburn City, etc., v. Leonard*, 40 Barb., 119; *Reenor v. Webb*, 36 How. Prac., 358; *Squier v. Norris*, 1 Lansing, 282; *Paier v. Walker*, L. R., 5 Excheq., 173; *Gillig v. Lake, etc.*, 2 Nevada, 214; *Scott v. Baker*, 3 West Virginia, 285; *Lee v. Methodist Church*, 52 Barb., 116; *Stanton v. Camp*, 41 Barb., 274.

Otherwise where it is apparent from the entire instrument that he intended to contract on behalf of his principal, and extraneous evidence is admissible to show such fact, unless the instrument is without ambiguity *Auburn City, etc., v. Leonard*, 40 Barb., 119; *Becker v. Lamont*, 13 How. Prac. Rep., 23; *Lee v. Methodist Church*, 52 Barb., 116; *Green v. Skeel*, 5 N. Y. Supreme Court Rep., 25; *Beattie v. Lord Ebury*, 8 Eng. Rep., 625; *Smith v. Morse*, 9 Wallace, 16; *Babbitt v. Young*, 51 N. Y., 242; *Townsend v. Hubbard*, 4 Hill, 351; *Pearse v. Welborn*, 42 Ind., 331; *Episcopal Church v. Varian*, 28 Barb., 644; *Haight v. Lahler*, 30 Barb., 218; *Thompson v. Tioga, etc.*, 36 Barb., 79; *Bank of Genesee v. Patchin*, 19 N. Y., 312; *Banking Assn. v. White Lead Co.*, 35 N. Y. R., 505; *Olcott v. Tioga, etc.*, 40 Barb., 179, affirmed 27 N. Y., 546; *Horton v. Garrison*, 23 Barb., 176; *Randall v. Snyder*, 1 Lansing, 168; *Barbour v. Litchfield*, 4 Abb. Ct. Appeals, Dec., 655; *Robb v. Ross Co. Bank*, 41 Barb., 586; *McClellan v. Reynolds*, 49 Missouri, 312; *Gillig v. Lake, etc.*, 2 Nev., 214; *Wake v. Harrop*, 1 Hurl.

and Colt., 202; *Fairlie v. Fenton*, L. R., 5 Excheq., 169; *Trueman v. Loder*, 11 Ad. & Ellis, 589, 39 Eng. Com. Law R.; *Wolfley v. Rising*, 12 Kansas, 535.

It is only in cases when the language admits of no doubt, and is without ambiguity, that evidence in explanation is excluded. *Lee v. Methodist Church*, 52 Barb., 116.

In such case, if he exceed his authority, he is liable upon a warranty that he has the authority he assumes. It is sufficient however in the complaint to state the facts. *Aspinwall v. Torrance*, 1 Lansing, 386; *Union Bank v. Bush*, 36 N. Y., 636.

As where he is described in the body of the instrument as an officer, etc., or as agent for a particular person, or signs as agent for a particular person, the person with whom he contracts knowing the fact of such agency. *Bellinger v. Bentley*, 4 N. Y. Supreme Ct. R., 71, S. C. 1 Hun, 563; *Thomas v. Bishop*, Cases Temp., Hardw. 1, and Mr. Lee's note to his edition, p. 3; *Hicks v. Hinde*, 9 Barb., 528.

If, however, the instrument be required to be under seal, it must be executed in the name of the principal. *Townsend v. Hubbard*, 4 Hill, 351; *Hyatt v. Seeley*, 11 N. Y., 52; *Haight v. Lahler*, 30 Barb., 218.

See *O'Reilly v. King*, 2 Robertson, 592; *Wolfley v. Rising*, 12 Kans., 535.

It is doubtful whether *Townsend v. Hubbard* (4 Hill, 351) so far as it holds the principal is not liable on an instrument under seal, if his name be not affixed by the agent is sound law. The more recent cases hold that although a seal be affixed, the principal is bound by the agreement, if he would be without seal; that unnecessarily affixing a seal will not vitiate the agreement. *Stanton v. Camp*, 4 Barb., 274; *Addison on Cont.* (6th Eng. ed.), 622; *Worrall v. Munn*, 5 N. Y., 229; *Wood v. Auburn, etc.*, 8 N. Y., 160.

An endorsement of a note "A. B. Cashr." binds a bank of which A. B. is cashier.

This class of cases—the endorsement of commercial paper—seems to be an exception to the general rule, as the contract does not lie exclusively in the signature, but lies principally in parol and is inferred by law. Parol proof does not contradict the terms of the contract. *Castrique v. Buttigieg*, 10 Moore's

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Priv. Council, 94; *Robb v. Ross Co. Bank*, 41 Barb., 586; *Houghton v. First National Bank*, 28 Wisc., 663; *Thompson v. Toga, etc.*, 36 Barb., 79; *Babcock v. Beman*, 11 N. Y., 200; *Bank of Genesee v. Patchin*, 19 N. Y., 312.

Whether the principal may be held responsible though not named in the contract, is quite another question. Although the agent may be personally liable, the adverse party may nevertheless proceed against the principal, although he be not named or referred to in the contract. *Dyckers v. Townsend*, 24 N. Y., 57; *Pinckney v. Hagadorn*, 1 Duer, 89, said in *Tallman v. Franklin*, 14 N. Y., 590, to have been affirmed by the Court of Appeals. *Tallman v. Franklin*, 14 N. Y. Rep., 584; *Worrall v. Munn*, 1 Seld., 229; *Ford v. Williams*, 21 How. U. S., 287; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. U. S., 447; *Nash v. Towne*, 5 Wallace, 703; *Smith's Leading Cases*, 6th Am. ed., vol. 2, p. 429; *Am. Lead'g Cases*, 5 ed., vol. 1, p. 726; *Wolfy v. Rising*, 13 Kans., 535.

The rule of law which requires an agent, in the execution of written instruments, to sign the name of his principal is confined to agreements required to be under seal. *Coleman v. First National, etc.*, 53 N. Y., 393; *New England, etc.*, v. *De Wolf*, 8 Pickering, 56; *Pinckney v. Hagadorn*, 1 Duer, 89, affirmed as above stated; *Worrall v. Munn*, 1 Seld., 229.

While it is true that parol evidence cannot be introduced to discharge a person who has signed his own name without disclosing his agency, yet it is competent by parol evidence to charge another as the principal for whom and by whose authority the contract was actually made. *Coleman v. First National, etc.*, 53 N. Y., 393; *Nash v. Towne*, 5 Wallace, 703; *Dyckers v. Townsend*, 24 N. Y., 59; *Ford v. Williams*, 21 How. U. S., 287; *Salmon, etc.*, v. *Goddard*, 14 How. U. S., 447; *Trueman v. Loder*, 11 A. and E., 595.

Some cases make an exception of commercial paper, and hold that only those parties are liable whose names appear on the face of the instrument.

Bank of North America v. Hooper, 5 Gray, 567.

But an undisclosed principal may sue and be sued on a written agreement made by his agent in his behalf, and this right and liability of the principal do not depend on the fact that his name is undisclosed, but on the fact that he is the principal who has authorized the agreement. *Trueman v. Loder*, 11 Ad. and E., 595, 39 Eng. Com. Law Rep.; *Dyckers v. Townsend*, 24 N. Y., 57.

In *Dyckens v. Townsend*, 24 N. Y., 57, neither the name nor the existence of the principal appeared on the face of the instrument which read as follows:

"New York, May 2nd, 1854.

"I have purchased of Dyckers, Alstine & Co. 500 shares of the stock of the New York and Erie R. R. Co., at seventy-one per cent. and deliverable in sixty days, buyer's option, with interest at the rate of five per cent. per annum. W. S. Hoyt."

"The intention of the statute, as it appears to us, is as fully accomplished when the contract is signed by the agent as if it had been signed by or in the name of the principal."

And it may be urged with some plausibility that it was intended by this section, allowing the agent to sign, to authorize him to sign his own name because without this section the agreement would be valid if the agent signed the name of his principal.

"Although the statute requires an executory contract for the sale of land to be in writing, subscribed by the party or his agent lawfully authorized, it is not necessary that the agent should have written authority. And where a party, without authority, executes a contract for the sale of lands in the name of the owner, a ratification by the latter, although by parol, makes the contract valid within the statute." *Newton v. Bronson*, 13 N. Y., 587.

In *Williams v. Bacon*, 2 Gray, 393; *New England, etc. v. Dewolf*, 8 Pickering, 56; *Lerned v. Johns*, 9 Allen., 421, the agent signed his own name with no other words added.

In *Pinckney v. Hagadorn*, 1 Duer, 89, and *Tallman v. Franklin*, 14 N. Y., 584, the agent signed his own name.

[Law Reports, 7 House of Lords, 27.]

March 24; May 15, 1874.

*ROBERT COOK, Appellant; and JOHN FOWLER, J. G. [27
WOOD, and J. ROBERTS, Respondents.

Warrant of Attorney—Defeasance—Interest on Money secured.

Where a written security is given for the payment of money at a certain day, with interest up to that day, and the sum secured and the interest thereon are not paid at the day, the principal and interest become from that time a debt which, when recovered by legal process, may, in the discretion of a jury or of the court, be made the subject of an additional liability, which, however, is not properly a liability to interest according to the contract, but to damages for the breach of it.

Per LORD CHELMSFORD: The defeasance of a warrant of attorney is not a contract, but merely a description of the object of the security, and of the means of enforcing payment.

Per LORD SELBORNE: There is no rule of law that, upon a contract for the payment of money on a day certain, with interest at a fixed rate, down to that day, a farther contract for the continuance of the same rate of interest is to be implied.

A warrant of attorney was given to secure payment of a sum of money. Its date was the 2d day of May, 1864, and the defeasance was in these terms: "The within written warrant of attorney is given for securing the payment of the sum of £1,330, with interest thereon, at and after the rate of £5 per cent. per month, on the 2d day of June next. Judgment to be entered up forthwith," &c.:

Held, that this was nothing more than an authority to enter up a judgment for these various sums, to be ascertained on the 2d of June, 1864, after which time the holder would merely stand as a creditor for the sums so ascertained, and the statutable rate of interest thereon that might be allowed him by a jury or by the court.

THIS was an appeal against a decision of Vice-Chancellor Stuart. William Bevan, late of Stapleton, in the county of Gloucester, was indebted to Cook (among other persons), and on the 2d of May, 1864, gave him a warrant of attorney, the defeasance of which was in the following terms:

"The within warrant of attorney is given to secure the payment of the sum of £1,330, with interest thereon at and after the rate of £5 per cent. per month, on the 2d of June next, judgment to be entered up forthwith; and in case of default in payment of the said sum of £1,330, and interest thereon, on the day aforesaid, *execution or executions, [28 and other processes may then issue for the said sum of £1,330 and interest, together with costs of entering up judgment, &c., &c., and all other incidental expenses whatever." No judgment was entered up. Bevan made his will on the 3d of May, 1864, and made Wood and Roberts his executors and trustees; he died on the 25th of the same month, and Wood and Roberts duly proved his will. A creditor's suit for the administration of the estate of Bevan (*Robinson v. Wood*) was afterwards instituted, and the appellant came in

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as a creditor under that suit, but did not give any particulars of his demands against Bevan's estate. On the 11th of March, 1867, Wood and Roberts therefore filed their bill against Cook, praying for accounts, for liberty to redeem any premises comprised in securities given to him, appellant, by their testator, and then alleged to be held by him, and for costs. The appellant put in an answer on the 14th of May, 1867, in which he referred to mortgages made to him by Bevan of certain lands in Ballin, in the county of Westmeath, and in Shire Newton, in the county of Monmouth ('). He also declared his readiness to account, stated the warrant of attorney, and claimed the principal sum due under it, with interest thereon at the rate of 5 per cent. per month. Both the suits came on for hearing before Vice-Chancellor Stuart, and an order was made for taking the accounts. The chief clerk made his certificate on the 8th of March, 1869, allowing the rate of interest claimed by the appellant. On the 12th of March, Fowler, as a creditor of Bevan, took out a summons to vary the chief clerk's certificate, and on the 7th of July, 1869, the Vice-Chancellor made an order varying it by allowing interest at 5 per cent. for the month, from the 2d of May, 1864, to the 2d of June, 1864, after which he fixed the rate of interest at only 4 per cent. per annum.

This was the order now appealed against.

Mr. *E. K. Karlake*, Q.C. (Mr. *F. H. Daly* was with him), for the appellant: Whenever a security is given for the payment of money with *interest at a certain time, and payment is not then made, the rate of interest continues afterwards to be that which was fixed by the instrument securing it. Here is a valid instrument of security, and the particular rate of interest is settled by agreement between the parties. The appellant here had had other transactions with Bevan, and was, in fact, mortgagee of two properties, one in Ireland and one in Monmouthshire, and he had also a charge on a house in Bristol. He entered into an arrangement to give up his securities on having payment made to him. That payment must be calculated on the footing of those securities. The amount of interest given in ordinary cases by the court can only apply where there has not been any stipulated amount of interest settled by agreement between the parties. Here the amount has been expressly settled between them. The defeasance of this warrant of attorney gave to the appellant

(1) All these circumstances are so fully referred to by the Lord Chancellor, one portion of his judgment being expressly founded on them, that it has been deemed unnecessary to set them out here at length.

in direct and express terms the interest now claimed, and there is no rule of construction applicable to such an instrument which, either at law or in equity, requires that the appellant should accept a less rate of interest than what had so been agreed upon. Here is an express contract. There is no ground on which a court can be called on to vary it. By the law as it now stands, any person is entitled to contract to pay any rate of interest, and such a contract is perfectly valid. If the time at which the principal of any money bearing interest ought, by the terms of a written contract, to be paid, is allowed to expire without payment, the party entitled to the payment may, in an action for the principal, recover the same interest from the date of the last payment of it: *Price v. Great Western Railway Company* (*). That case shows that where nothing is said of future interest, it will continue as of course; and Mr. Baron Parke gave in that case the reason for the rule, saying: "Because the deed shows the intention of the parties that it should be a debt bearing interest." That rule had previously been adopted in *Atkinson v. Jones* (*), which was the case of a warrant of attorney, given by a third person to secure the due payment of interest on a debenture; the court would not interfere to enter satisfaction upon the roll, it not being sufficiently clear from the defeasance that the warrant of attorney was intended to cover only the interest up to the day named. *So that the court must have considered [30 that the warrant of attorney would cover the same interest accruing after the day named.

[The LORD CHANCELLOR: Suppose a promissory note, payable twelve months after date, but not paid at the time, what interest would be given on it by the jury?]

That which had been stipulated for between the parties. If they had fixed the interest at 3 per cent., of course it would not be increased; if they had fixed the interest at 6 per cent. or more, that would be given—it would not be diminished; "the intention of the parties," as Mr. Baron Parke said, would afford the guide. Here the rate of interest had been expressly agreed upon.

Mr. *Dickinson*, Q.C., and Mr. *Hemming*, for the respondents: Interest may now of course be stipulated for to any amount the contracting parties think fit; but if stipulated for up to a certain time, the liability to pay that interest does not go on continuously. The interest, as interest, ceases at the time mentioned. If the contract is not performed at the time, the amount recoverable, in addition to

(*) 16 M. & W., 244.

(*) 2 Ad. & El., 439.

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that stipulated for, is recoverable not as continuing interest, but as damages for breach of the contract to pay. Now, those damages are not necessarily to be measured by the quantum of the interest agreed upon by the parties themselves. The statute 3 & 4 Will. 4, c. 42, s. 28, which gives to a jury the power to assess damages for non-payment of money, expressly says that the jury may give such damages "if they shall think fit;" so that, so far from being obliged to give them, and to measure them by the amount of interest secured by the instrument, they may refuse the damages altogether. This case does not come within those referred to on the other side. The debenture in *Price v. The Great Western Railway Company* was declared to be a mortgage. A warrant of attorney is not a mortgage, it is a personal contract to secure payment of a debt, and in this instance that debt was to be paid, with stipulated interest upon it, at a time certain. If not paid then, the contract was broken, and all that could afterwards be recovered would be damages for the breach of it. In a note to *Mounson v. Redshaw* ⁽¹⁾, it is shown that interest even upon a mortgage deed, accruing after the day fixed in the deed, does not become part of the debt, but is to be treated as damages for the detention of the debt. An excessive amount of interest submitted to for a time upon particular pressure, is certainly not a thing which, contrary to all legal analogies, the courts would continue upon mere implication. The money claimed after the day stipulated, not being interest as stipulated, must be in the discretion of the court, and must be that which the statute, or the rules of practice, would prescribe.

Mr. *Karslake*, in reply: The warrant of attorney here, though it may not be a mortgage, is equivalent to a charge by a debtor on his land, and may be treated as an equitable mortgage. It cannot be argued that, because the judgment was not entered up at the end of the month, the instrument ceased to be a security at all. Yet, if not so argued, it is a valid and still subsisting security for the money mentioned in it according to the mode there mentioned, both as to principal and interest. If this instrument had only given interest at 6 per cent., no court would have reduced that amount to 5 per cent. Then, on what principle can it be reduced now?

The LORD CHANCELLOR (Lord Cairns), after stating the facts of the case, said: So far as the literal construction of that warrant of attorney and defeasance goes, your lordships will observe that there is no notice of any contract of

⁽¹⁾ 1 Wm. Saund., 201, n; see also *In re Kerr's Policy*, Law Rep., 8 Eq., 381.

debt, or of any contract for forbearance of money for any length of time beyond the time specified upon the face of the defeasance. It is an authority to enter up judgment, and a stipulation that execution is only to issue in one way and for one purpose. It is to issue on the 2d of June following the date of the warrant of attorney—it is to issue then “in default of payment of £1,330 and interest thereon,” which, of course, means the interest stipulated at the rate of 60 per cent. “on the day aforesaid”—that is, on the 2d of June; and then in that case “execution and other process may issue for the said sum of £1,330 and interest” (which, of course, must necessarily mean interest at that rate and due up to that day), “together with the costs of entering up judgment, registering the same, and writ and writs *of execution or executions, sheriffs’ [32 poundage,” and so on. Therefore, taking the literal construction and effect of this warrant of attorney and defeasance, it would appear to me to amount to an authority to issue execution on the 2d of June for one total sum, which is to be composed of the principal sum £1,330, interest at 60 per cent. up to the 2d of June, and those expenses, unascertained in the first instance, but to be ascertained at the time described, as expenses of sheriffs’ poundage, and other matters of the same kind.

My lords, it appears to me that, upon the literal construction of this instrument, it is nothing more than an authority to enter up a judgment, which would be substantially a judgment for those various sums, their amount to be ascertained on the 2d of June, 1864; and that then, if execution is not levied at that time, and payment is not at that time enforced under the execution, the judgment creditor would stand from that time forward as a creditor for the sum for which he might then have levied, together with the ordinary statutable rate of interest upon that sum—namely, the rate of 4 per cent.

My lords, if that view should be adopted (and it appears to me that it might safely be adopted in this case), there would be no necessity to go farther. But I will ask your lordships to consider also the alternative view by which, I think, the same conclusion will be arrived at. If this is not merely a judgment for the principal sum and the amount of interest, and costs up to the 2d of June, which judgment is thenceforward to bear interest at the rate of 4 per cent., it is, at all events, a warrant of attorney and defeasance which is given to secure a debt of £1,330 with interest up to a certain day, and without any mention of subsequent interest upon the

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face of the instrument. If so, according to the well-known principle which has been referred to in many cases, and which may be taken most conveniently from a note to the case of *Mounson v. Redshaw* ⁽¹⁾, any claim, in the nature of a claim for interest after the day up to which interest was stipulated for, would be a claim really, not for a stipulated sum and interest, but for damages, and then it would be for the tribunal before which that claim was asserted to consider [33] the position of the claimant, and *the sum which properly, and under all the circumstances, should be awarded for damages. No doubt, *prima facie*, the rate of interest stipulated for up to the time certain might be taken, and generally would be taken, as the measure of interest, but that would not be conclusive. It would be for the tribunal to look at all the circumstances of the case, and to decide what was the proper sum to be awarded by way of damages.

Apply that to the present case, and let me ask your lordships to look for a moment at the very peculiar circumstances of the present case. This warrant of attorney and defeasance or judgment was given by William Bevan on the 2d of May, 1864. He died on the 25th of the same month, which was before the time stipulated for the payment of the principal sum with the high rate of interest, namely, the 2d of June. It appears that his executors were not aware of this warrant of attorney, or of the stipulations in the defeasance. On the 11th of June, a few days after his death, an administration suit was instituted, the suit of *Robinson v. Wood*; and, on the 25th of June, the usual decree was made in that suit for the administration of the estate of the testator. On the 4th of July, 1864, the present appellant, Cook, filed a bill—the suit of *Cook v. Wood*—as a judgment creditor and mortgagee of the testator, alleging, what was the fact, that he had various claims against the testator as a mortgagee, and in other characters, but giving no specification and no particulars with regard to this warrant of attorney and defeasance. Finding that he was asserting rights as a creditor generally, the executors adopted the usual course. He was served with a notice of the decree in *Robinson v. Wood*, which of course stayed his own suit; but he did not come in and prove his debt, or explain the character of the security which he held. On the 11th of March, 1867, that is to say, after Cook had lain by for nearly three years, the executors, inasmuch as he had not come in under the suit and claimed to have securities as a mortgagee, were forced to file a bill against him, which is the bill in

(1) 1 Wm. Saund., 201, n.

Wood and Roberts (the executors of Bevan) v. *Cook*. That bill was filed on the 11th of March, 1867, it was a bill for an account, and to redeem whatever securities he might hold, the plaintiffs alleging that Cook would not *disclose the [34 particulars of his securities. On the 14th of May, 1867, Cook put in his answer in that suit, and referred to the judgment which had been entered up under this warrant of attorney, but referred to it in general terms, without giving any details as to the rate of interest which he claimed to be running on under the warrant of attorney. On the 12th of June, 1868, an agreement was come to between Cook and the executors, who were still without information as to the details of this defeasance. By that agreement, although the time for proving debts in the first suit of *Robinson v. Wood* had passed, Cook was to be admitted to come in as a creditor in *Robinson v. Wood* for whatever might be found to be due to him. Under that agreement, on the 28th of November, 1868, that is to say, more than four years after the death of Bevan, an affidavit was filed by Cook, for the first time giving the particulars of this warrant of attorney and defeasance, upon which his case now rests, and upon which he claims that interest had been running on during the whole time at the rate of 60 per cent.

Now, my lords, if this is to be judged of (and it is the most favorable view of the case that can be taken on behalf of the appellant that it should be so judged of) as a case in which Cook is coming and claiming damages for the non-payment of a debt due to him on the 2d of June, 1864, it appears to me to be clear that any tribunal judging of that claim for damages would be bound to take into account the circumstances to which I have referred—circumstances which show that Cook was endeavoring to prevent the character of this defeasance from transpiring—that he was endeavoring to keep back his security, and thereby to become entitled to claim this high rate of interest, whereas it is obvious that if he had at the first disclosed the nature of the claim in respect of interest which he was prepared to allege, steps would have been taken to pay off the principal sum that was due to him.

Therefore, whether your lordships take it as a judgment for a specific sum, bearing no interest beyond the statutable interest of 4 per cent., or whether you take it as a claim for damages for the detention of a debt, in either case it appears to me to be out of *the question that the rate of 60 per [35 cent. could be allowed. It appears to me that in the first view the rate of 4 per cent. is the rate absolutely assigned by

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statute upon the payment of judgment debts; and, in the second case, it is for the tribunal to fix the rate of damages. It is possible that the rate of 5 per cent. might be given by a jury or by a judge who was performing the functions of a jury; but the primary judge having in this case only given the usual rate assigned in the Court of Chancery, namely, 4 per cent., I certainly do not propose to advise your lordships to disagree with that opinion at which he has arrived, but, on the contrary, I advise and move your lordships that this appeal should be dismissed with costs.

LORD CHELMSFORD: My lords, I think the order of Vice-Chancellor Stuart refusing the appellant interest at the rate of 5 per cent. per month after the 2d June, 1864, and allowing him interest at 4 per cent. per year from that day, is right and ought to be affirmed.

There is no authority that I can find to support the argument of the counsel for the appellant, that where a security for money payable at a certain day stipulates for the allowance of a certain rate of interest up to the day fixed for payment, interest at the same rate is implied to be payable afterwards. On the contrary the distinction seems to be well established between cases where the interest is expressly reserved in the instrument, and where it is not. In the latter case it is recoverable, not as interest according to the contract, but as damages for the breach of it.

In the present case there is properly speaking no contract. The defeasance of a warrant of attorney is not a contract, but merely a description of the object of the security and of the means by which the judgment creditor, in case of the debtor's default, may enforce payment of the sum secured. That sum in the present case is £1,330, with interest at and after the rate of £5 per cent. per month on the 2d of June. If the judgment had been entered upon that day upon the default of payment, execution might have been issued immediately for the principal sum and interest at the rate specified. Or the appellant might have brought his action [36] upon the judgment, and might have *recovered farther interest, not as interest *eo nomine*, but by way of damages.

The appellant, by delaying to enter up judgment, cannot place himself in a better position than if he was a judgment creditor. And as he would then, according to the practice of the court, have been allowed interest only at 5 per cent., so the allowance by the Vice-Chancellor of that rate of interest after the 2d of June, 1864, is as much as he is entitled to.

LORD HATHERLEY: My lords, I entirely concur with the

judgment which has been proposed to your lordships, and in the opinions which have been expressed by the two noble and learned lords who have preceded me.

The question as to whether interest should be calculated at the rate mentioned in the original warrant of attorney resolves itself simply into this: Is there or is there not any contract after the day upon which judgment was to be entered up for the payment of any specific sum and interest? The cases which were cited with reference to mortgages, show clearly that the interest, after a given day upon which day the principal and interest secured by the mortgage were made payable, can only be given in the nature of damages. Among the numerous cases which may be cited in which this point has been fully discussed, I will just take leave to refer your lordships to one, because it contains some observations of Mr. Justice Bayley, which seem to me to be peculiarly applicable to this case. The case to which I refer was the case of *Cameron v. Smith* ⁽¹⁾. The simple point in that case was whether or not a petitioning creditor's debt in bankruptcy could be supplemented by adding interest to his debt (which the commissioners had done) when there was no express stipulation for interest, and it was there held that that could not be done, because the commissioners had no power to award damages after the bankruptcy, and as any interest that could be allowed would have to be allowed by way of damages and not by way of interest, it was beyond the province of the commissioners. In considering the case *Mr. Justice Bayley makes these observations,—“Al- [37 though, by the usage of trade, interest is allowed on a bill, yet it constitutes no part of the debt, but is in the nature of damages, which must go to the jury, in order that they may find the amount; and it is competent for them either to allow 5 per cent. or 4 per cent., according to their judgment of the value of money; or they may even allow nothing, in case they are of opinion that the delay of payment has been occasioned by the default of the holder”—that is, the holder of the instrument.

My lords, I think that in this particular case the appellant could not put his case higher than the two ways in which it has been put by my noble and learned friend on the woolsack; namely, to treat the case either as a judgment actually entered up, which it was not, or else as a claim to damages in consequence of the default of payment, and in that case really it would only come within the ordinary rule of the

⁽¹⁾ 2 B. & Ald., 305.

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Court of Chancery, which is to allow interest at the rate of 4 per cent.

LORD SELBORNE: My lords, unless it can be laid down as a general rule of law, that upon a contract for the payment of money borrowed for a fixed period, on a day certain, with interest at a certain rate down to that day, a farther contract for the continuance of the same rate of interest after that day, until actual payment, is to be implied, the decision of the Vice-Chancellor in this case is not erroneous.

I entirely agree with these of your lordships who have preceded me that no such contract is to be implied, unless there is something to justify it, upon the construction of the words of the particular instrument; and that, although in cases of this class interest for the delay of payment *post diem* ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract. The rate of interest to which the parties have agreed during the term of their contract may well be adopted in an ordinary case of this kind by a court or jury, as a proper measure of damages for the subsequent delay; but that is because, ordinarily, a reasonable and usual rate of interest, which it may be presumed would have been the same whatever might 38] be the duration *of the loan, has been agreed to. But in the case before your lordships the agreed rate of interest is excessive and extraordinary; and, although no question is raised between the present parties as to its fairness or reasonableness, so far as it was matter of express contract, it by no means follows that it would have been fair and reasonable, or would have been so regarded by the borrower, if it had been indefinitely extended to every possible delay of payment after the stipulated time. In my opinion no court or judge could, under the particular circumstances of this case, have adopted that rate of interest as a proper measure of damages, without a very great miscarriage of justice.

I entirely agree in the motion which my noble and learned friend upon the woolsack has submitted to your lordships.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 15th May, 1874.

Solicitor for appellant: *J. McDiarmid.*

Solicitors for respondent: *Thos. White & Son.*

[Law Reports, 7 House of Lords, 39.]

*OSBORNE HILLIARD, Appellant; and LUKE EIFFE [39 Respondent.

March 23; April 27; May 16, 1874.

Suit by Legatee alone—20 & 21 Vict. c. 79, s. 68.

A bill to set aside a deed containing charges of fraud which the court deems not to be proved, will be dismissed as to those charges, but need not be dismissed altogether, if there are other charges which the court deems to constitute what amounts to great irregularity and legal fraud, and to require the granting of the relief prayed for.

Where, in a bill to set aside the grant of an annuity made by A. to B., and charged upon A.'s land, with also a personal covenant for payment, the plaintiff is himself the devisee as well as residuary legatee under A.'s will, he ought, under the 20 & 21 Vict. c. 79, s. 68 (Ir.), to give notice to the other party that he intends to give in evidence, as proof of the devise or testamentary disposition, the probate of the will. * But if he should fail to give this notice, the omission would only create a technical difficulty in the case, and the court might, properly, and would adjourn the hearing to give an opportunity to remove that technical difficulty.

Where in such a case the objection was likewise made that the plaintiff was legatee and had not proved the assent of the executor to the legacy, nor his insolvency, nor his refusal to sue, nor collusion on his part; but the Vice-Chancellor overruled the objection (relying on the case of *Consell v. Bell*⁽¹⁾), and the defendant, though carrying the case to the Court of Appeal in Chancery, did not present to that court this or the previous objection to the Vice-Chancellor's decision:

Held, that he could not afterwards, on bringing up the case to this house, present these objections in argument as objections which might be made here to the decision of the Court of Appeal.

THIS was an appeal against a decision of the Vice-Chancellor of Ireland, which had been affirmed on appeal by the Lord Chancellor (Lord O'Hagan), and the Lord Justice of Appeal, Christian.

John Norton, formerly a captain in the 34th regiment of foot, had, on the 19th of February, 1864, executed a deed by which he created in favor of one O'Brien Hilliard, a son of the present appellant, and then under age, a perpetual annuity of £100, to commence from his own, Norton's death. The annuity was charged on his real estate, and likewise secured by a covenant affecting his personal estate. The annuity was to be payable by half-yearly payments on the 1st of May *and the 1st of November in each year. Mr. [40 Norton, on the 28th of January, 1867, made a will by which he gave the interest of £2,000 to his sister for her life, and a legacy to each of his executors, and the rest of his property to his relative Luke Eiffe, the present respondent, absolutely. He appointed William Lyons and the Rev. Francis Heaton his executors. Mr. Norton died on the 2d of February, 1867. Mr. Luke Eiffe was then under age.

(¹) 1 Y. & C. C. C., 569.

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Mr. Lyons, alone, on the 6th of March, 1867, proved the will. On the 26th of June, 1867, the appellant, in the name and on behalf of his son, commenced an action in the Court of Queen's Bench in Ireland against Mr. Lyons, the executor, to recover the first half-yearly payment of the annuity, which by the terms of the deed had become due on the 1st of May preceding. This sum was paid, but the payment was accompanied by the following protest: "This payment is made without prejudice to the validity of the claim being contested by Mr. Luke Eiffe, the owner of the property charged with the annuity, upon his coming of age, and is not to be considered as in any way a recognition of the validity of the demand of the plaintiff, or to prevent such being contested." Mr. Eiffe became of age on the 23d of September, 1867. On the 5th of November in that year a second action was commenced by Mr. Hilliard to recover the second half-year's portion of the annuity, which, by the terms of the deed, was to become payable on the 1st of November. On the 14th of November, 1867, Mr. Eiffe exhibited his bill of complaint in chancery against Osborne Hilliard, the father of the annuitant, and O'Brien Osborne Hilliard, the annuitant himself, to which bill Mr. Lyons, the acting executor under Norton's will, was (on account of his payment of the first instalment of the annuity) also made a defendant, alleging various circumstances, which were charged as constituting undue influence exercised by the first named defendant over Norton in order to procure, and which it was declared had procured, the grant of the annuity in question⁽¹⁾. Answers were put in, and the cause was 41] heard before the *Vice-Chancellor of Ireland on written and oral testimony. The will was not proved *per testes*, nor was any notice given to the defendants in the suit that the probate would be produced as proof of the devise of real estate, but the probate was produced in the ordinary way. No evidence was given of collusion with the executor, or of his insolvency, or of his having refused to sue. An objection was, on these grounds, raised to the maintenance of the suit. His honor, on the 26th of November, 1868, delivered judgment on the question raised as to the frame of the suit, and, on the authority of *Consett v. Bell*⁽²⁾, held it to be maintainable. On the 9th of December, 1868, he

(1) There were in the bill certain charges of fraud which were deemed by the court below to be entirely unproved, and as to them the bill was dismissed, and costs ordered to be paid to the defendant. It was insisted for the appellant (defendant

below) that as the plaintiff had failed in supporting these, his bill ought to have been altogether dismissed. As to this matter, see Lord Chelmsford's and Lord Hatherley's opinions, *post*, pp. 51, 52.

(2) 1 Y. & C. C. C., 569.

pronounced a decree directing that the deed should be delivered up to the solicitor of the plaintiff in the equity suit to be cancelled. O'Brien Osborne Hilliard, the annuitant, died on the 29th of January, 1869, leaving his father his heir, and on the 11th of February, 1869, the suit was ordered to stand revived as against Mr. Hilliard, the father, and as against the nominal defendant, Lyons. Mr. Hilliard appealed against the order of the Vice-Chancellor, and the appeal was argued in April. On the 31st of May, 1869, the Lord Chancellor, Lord O'Hagan, and the Lord Justice of Appeal, Christian, affirmed the order of the Vice-Chancellor. The present appeal was then brought. In support of the appeal two objections were set forth in the 13th and 14th "Reasons" at the end of the appellant's case in this house. These were: 13. "Because the plaintiff has not by his bill averred, nor has he proved, a state of facts showing a right or title in him to maintain the suit, which should have been instituted by the defendant Lyons as the acting executor of Norton's will." The 14th reason. "Because this suit has been instituted by the plaintiff as residuary devisee and legatee of that will seeking relief as against the appellant and against Lyons as such executor in respect of the real and personal estate respectively of the late John Norton, and because, as regards such real estate, the will had not been duly proved therein, and as regards such personal estate, no assent to said residuary bequest by said executor, or any collusion on his part with the other defendants, or either of them, nor insolvency, has been averred or proved therein, nor has any evidence been therein given that the funeral and testamentary expenses, debts, and *gen- [42] eral legacies have been paid, nor of said executor having declined to institute a proceeding for the purpose of setting aside the said deed, nor have any special circumstances been alleged or proved, showing why a suit for that purpose has not been, or should not be, instituted by the said executor." The respondent's "Reasons" took no notice of these objections, but were addressed to the merits of the case.

Mr. *J. Napier Higgins*, Q.C., and Mr. *Mulligan* (of the Irish Bar), pressed these two objections on the attention of the house. The 20 & 21 Vict. c. 79: "An Act to amend the Law relating to Probates and Letters of Administration in Ireland" provides, sect. 65, that where a will affecting real estate is to be proved in solemn form notice shall be given to devisees or persons affected by the will, and, sect. 66, where the will is proved in solemn form, the decree of the court shall be binding on persons interested in the real estate;

sect. 68 enacts that the party relying on a devise or a testamentary disposition shall give the other party this notice; "In any action at law or suit in equity where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise, &c., affecting real estate, it shall be lawful for the person intending to establish in proof such devise, to give the opposing party seven days' notice that he intends, at the trial or other proceeding, to give in evidence, as proof of the devise or testamentary disposition, the probate of the will; and the probate shall be sufficient evidence of the will and its validity and contents, unless notice is given that the validity of the devise or testamentary disposition is intended to be disputed." Nothing of that sort had been done here, no such notice had been given, nor was the execution of the will proved. Nothing had been done to show a title in the plaintiff to the real estate; nor with respect to the legacy had there been any evidence given that the executor had assented to the legacy, so that nothing had been done to show a title in the plaintiff to any part of the personal assets. [LORD SELBORNE: Does it appear that the defendant gave notice to the other side that this objection would be taken?] There was no need of notice, the provisions of the statute had created a duty which the plaintiff was bound to discharge; *they showed what the plaintiff might do, and what he ought to do, and, not having done it, the objection arose of itself.

The point which relates to a suit by a legatee is very important. The Vice-Chancellor himself so considered it, and discussed it at some length, but decided it against the appellant. For that decision he relied on the case of *Consett v. Bell* (¹), but that case is really no authority for the decision in the present (²).

(¹) 1 Y. & C. C. C., 569.

(²) The objections to the frame of the suit thus made the subject of these reasons for the appeal had been fully discussed in the court of the Vice-Chancellor, and, after stating the nature of both objections (see his observations, as to the will, quoted by the Lord Chancellor, *post*, p. 48), he had pronounced on the objection relating to the legatee the following judgment:

"The rule originally was, as laid down by Lord Redesdale in his treatise and in the earlier cases, that there must be either collusion with, or insolvency of, the personal representa-

tive, pleaded and proved, to entitle a creditor or legatee to sue for recovery of assets. This rule was first relaxed in cases where the personal representative of a deceased partner was sued with a surviving partner (as in *Bowsher v. Watkins* 1 Russ. & Myl., 277) for reasons unnecessary now to be considered. It was farther relaxed when there was proved to have been an express refusal of the personal representative to sue, and the more readily when the assets in question were only recoverable in equity. It was said in some of the cases where this was done, that such refusal might

There was no plaintiff here in respect of the real estate, for *there was nothing done, according to the require- [44] ments of the statute, by which title to the real estate was shown. And there was likewise no plaintiff in respect of the personal estate, for a mere legatee cannot sue in such a case as this, unless he shows a refusal on the part of the executor to sue, or collusion, or insolvency. The reason for the rule is obvious; if it did not exist there might be as many suits as there were persons claiming to be legatees or creditors. The rule itself is of old standing, and was acted on in *Bickley v. Donington* (1), and exactly adopted in *Alsager v. Rowley* (2). In the former of these cases the Lord

be deemed evidence of collusion, within the original rule. But I think that this is too narrow a ground on which to rest the decision, as there are many cases where such a refusal could not have been ascribed to collusion. In *Lancaster v. Evers* (4 Beav., 158) Lord Langdale held that a refusal by the executors to recover certain assets was in itself sufficient to take the case out of the rule, and he also seemed to be of opinion that the rule only applied to a proceeding against a debtor to the estate, and did not extend to a proceeding to realize a specific fund in court for the augmentation of the assets. But the case which appears to me to come nearest the present is that of *Consett v. Bell* (1 Y. & C. C. C., 569). There one of the defendants named Wilson claimed a sum of money under a deed executed to him by the testator and the executors, believing the deed to have been obtained *bona fide*, paid him the money. They afterwards, having reason to think that the deed was not valid, called on Wilson to refund, which he refused to do. The plaintiff, who was an infant, and a devisee and legatee in the will, filed a bill against the executors and Wilson and others for the purpose (amongst others) of setting aside the deed as fraudulent and obtained by undue influence, and praying that Wilson might be ordered to refund the sum which he had recovered from the executors, and for the administration of the assets of the testator. Wilson raised the point that the plaintiff's remedy was against the executors, and not against him, and relied upon the general rule that a legatee cannot sue a stranger indebted to the estate or holding part of the es-

tate. The Vice-Chancellor of England overruled this objection, although there was neither collusion, nor insolvency, nor any refusal to sue on the part of the executors, and decreed Wilson to refund the money. That case appears to me to be a conclusive authority against the objection to the frame of this suit. The rule now appears to be, subject to the exceptions of cases of collusion, of insolvency of the personal representatives, of refusal by them to sue, whether collusively or *bona fide*, or of the existence of what has been rather vaguely termed 'special circumstances.' The last exception seems to comprehend, and to be confined to, cases in which, from the nature of the assets or the position of the personal representative, it would be either impossible, or, at least, seriously inconvenient, for the representatives to take proceedings. In the present case I am of opinion that, after what has occurred, there would be very great difficulty in the way of the executor with respect to, at least, that portion of the bill which seeks repayment of the moneys already paid, and that his conduct, though not amounting to an actual refusal, affords evidence of an unwillingness to embark in so serious a litigation, sufficient to justify the plaintiff in filing his bill against him and the other defendants. On these grounds, and on the authority of *Consett v. Bell*, in the principle of which I concur, I shall overrule the objection to the frame of the suit."

(1) 2 Eq. Cas. Abr., 253; see also *Franklin v. Fern*, 2 Eq. Cas. Abr., 254; *Barnard. Ch. Rep.*, 32.

(2) 6 Ves., 748.

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Chancellor (Lord Hardwicke) said: "The whole management of the estate belongs to the executor, and the right of it is vested in him, and not to be taken out of him by creditors or legatees. If he releases and is solvent, it is a devastation, and he is answerable himself for the sum released to the creditors and legatees. If collusion and insolvency, it may be proper to come here for satisfaction against the debtor, but it must be always upon some special case." The rule thus laid down has always been recognized. *Consett v. Bell*⁽¹⁾, on which the Vice-Chancellor relied in the 45] court below, *does not impeach it, but proceeds on the peculiar circumstances which existed there, and, therefore, must be taken as being in accordance with it. That was a case where the executors themselves had acted wrongfully, or at least imprudently, by paying over to a supposed donee of property, money to which he was not, in reality, lawfully entitled; and there, of course, they came within the rule as to special circumstances, and the bill made them parties in respect of their wrongful acts. And no doubt they were in that respect proper parties. But besides that, the suit there was an administration suit. It is not so here. In *Stainton v. Carron Company*⁽²⁾ the Master of the Rolls distinguished the case on the very ground of the acts of the executors, and adopting Lord Justice Turner's opinion in *Travis v. Milne*⁽³⁾, said: "I think the cases may be summed up thus: that the person interested in the estates of the testator, not being the legal personal representatives, will not be allowed to sue persons possessed of assets belonging to the testator unless it is satisfactorily made out that there exist assets which might be recovered, and which, but for such suit, would be lost to the estate;" and, as that was not there made out, he allowed a demurrer to the bill. In *Saunders v. Druce*⁽⁴⁾ the same principle was recognized, Vice-Chancellor Kindersley expressly declaring that only the executors can sue a debtor to the testator's estate.

The rule of proceeding in equity must therefore be taken to be completely established, and this suit must fail. No collusion, no insolvency, nor refusal to sue is proved, nor is this an administration suit. This suit is improperly framed, and yet the Court of Appeal, taking no notice of this objection, has affirmed the order for the deed to be delivered up to the solicitor of the plaintiff to be cancelled—that plaintiff

⁽¹⁾ 1 Y. & C. C. C., 569; 11 L. J. (N.S.), Ch., 401.

⁽²⁾ 18 Beav., 146, 157.

⁽³⁾ 9 Hare, 141; 20 L. J. (N.S.), Ch., 665.

⁽⁴⁾ 3 Drew., 140-155.

not being the proper person to sue, and not having complied with the statutory directions.

The charges of actual fraud not being supported by any evidence whatever the bill ought to have been wholly dismissed.

Mr. *Pearson*, Q.C., and Mr. *Graham Hastings*, as to the argument relating to the frame of the suit, said that it was maintainable *in its present form according to the au- [46
thority of *Bowsher v. Watkins* (1), but they also insisted that the objections, though argued in the Vice-Chancellor's Court, had been abandoned in the Court of Appeal, and could not now be put forward.

It was not admitted by the appellant's counsel that the objections had been abandoned.

The LORD CHANCELLOR intimated that the house would communicate with the judges of the Court of Appeal on the matter, and ascertain exactly what had taken place.

The hearing was adjourned for that purpose.

April 27. The LORD CHANCELLOR (Lord Cairns): We have now received a communication from the learned judges of the Court of Appeal in Ireland stating that they are quite satisfied that the objection urged at the bar here upon the subject of the will of the testator having been proved, was not taken or insisted upon in the Court of Appeal in Ireland. The statement made to this house was that Mr. Butt, the leading counsel for the appellant before the Court of Appeal in Ireland, being very much pressed for time, and being desirous to be away to attend another case, opened the case more shortly than he otherwise would have done, and so did not argue the point; but that his junior, Mr. Hemphill, desired to argue this point. Lord Justice Christian states that Mr. Butt opened the case during the whole of two days, and that on the morning of the third he desired to supplement what he had said by certain farther observations and by citing some authorities. Lord Justice Christian has a most careful note of every point that was urged, and of every authority that was cited, and he says that this question was not alluded to in any way. And the Lord Chancellor concurs in that.

I ought to add that a statement having been handed in to us by both sides, with a view to its being transmitted to Ireland, of *what passed according to the recollection of [47
each side, the statement handed in by the appellant's solicitor contained this passage, "According to the practice of the Appeal Court in Ireland, the course is to hear only one of

(1) 1 Russ. & My., 277.

the appellant's counsel in opening the case and one junior only in reply; and so Mr. Hemphill was not heard until the reply, when he proposed to argue the point in question. Upon his proceeding to do so he was stopped by the court." The recollection of the learned judges does not tally with the statement that it was proposed to argue this point even in reply. But possibly, if that statement had been before the house on the former occasion it might have obviated the necessity of consulting the learned judges at all. Certainly I understood that what was alleged to have occurred was this, that the junior counsel, following his leader and as part of the opening, proposed to argue the point; but since it appears that it is the custom in Ireland that the junior is only heard in reply, it appears to be admitted that at the opening of the case there was no reference whatever made to this point. I ought to add that Lord Justice Christian says that if the point had been mentioned it would, in his opinion, have been a matter of course that the court would have ordered the case to stand over in order that the formal defect of proof might be supplied.

Mr. Higgins: It will now be a matter for your lordships' consideration, taking that statement as putting the house in possession of all that took place before the Court of Appeal in Ireland, whether your lordship would nevertheless think that, as we are appealing from a decree by the learned Vice-Chancellor, confirmed by the Court of Appeal, it is not open to us now, notwithstanding the forgetfulness of counsel in the Court of Appeal below, to take the point.

The LORD CHANCELLOR: No; that is quite settled by what passed on the former occasion—we only wished to know what actually passed in the court below. I am bound to say, so far as I have heard the case at present, it appears to me that this was an objection technical in the highest degree, and that there never was, at any point of the litigation [48] that I have observed, any *substantial idea on the part of your client that the capacity of the testator to make the will could be challenged.

The case was then fully heard on the merits.

May 15. *The LORD CHANCELLOR (Lord Cairns):* My lords, in this case it would be proper that I should in the first instance remind your lordships of a preliminary objection as to the suit, which was taken when the appeal was first opened, and of the grounds upon which your lordships, notwithstanding that objection, required the appeal to proceed, and heard it upon its merits. My lords, the nature of that objection was this, the bill in this case is filed by one

Luke Eiffe, who is the residuary devisee and legatee under the will of John Norton, dated the 28th of January, 1867, to set aside a deed of the 19th of February, 1864, by which Norton charged his real estate with an annuity of £100, and entered into a covenant binding his personal estate. When the bill was filed there were two principal defendants, the one, O'Brien Hilliard, who was an infant under the age of twenty-one years, and the other, Osborne Hilliard, his father. O'Brien Hilliard, the infant, died on the 29th of January, 1869, before the appeal in the Court of Chancery in Ireland came on to be heard, and he died before he attained the age of twenty-one years. The plaintiff in the suit, Eiffe, filling the double character of both devisee and legatee, there could be no question as to his right to sue, while if, on the other hand, he was only legatee, a question might arise whether the suit, which would then be limited to personalty only, should not have been instituted by the executor, who, in place of instituting the suit as plaintiff, was here made a defendant. The plaintiff produced in the ordinary way the probate of the will of the testator, but he did not prove the will *per testes*, or give that notice under the recent statute which, if not answered by the other side, would have made the probate of the will evidence with regard to the real estate passing under it.

In that state of things, the case came before the Vice-Chancellor of Ireland. It was heard, and in his judgment on this question as to the frame of the suit your lordships will remember he states: "A question has been raised by the infant defendant *that the present suit cannot be main- [49 tained, as the plaintiff has not established any right to sue either as devisee or legatee, that he has shown no title as devisee, as the will has not been proved in this cause as to real estate, and as notice has not been served under the Probate Act of using the probate for that purpose, that he has not alleged or proved any assent to the residuary gift to him of the personal estate, and that he has not shown collusion or insolvency on the part of the executor, to entitle him, as legatee, to sue the infant defendant, or his trustee, Osborne Hilliard. It seems a strange oversight to have omitted to prove the will as to the real estate, when the deed impeached by this suit purports to charge the annuity upon it as well as upon the personal estate. In consequence of it, I cannot regard the will as giving the plaintiff any title to that real estate, or make any decree in his favor in respect of it, if I come to a conclusion in his favor upon the invalidity of the deed."

My lords, I own that it appears to me that a better and

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safer course to have taken at the hearing of this case would have been for the Vice-Chancellor to order it at once to stand over upon this objection, so that the will might have been proved as to the real estate; and I feel some surprise, having regard to the expressions used in the judgment of the Vice-Chancellor, at the form which the decree made by his honor afterwards assumed. That decree declared "That the deed of annuity, dated the 19th day of February, 1864, in the pleadings mentioned, is fraudulent and void, and it is ordered that the defendant Osborne Hilliard do deliver up said deed of annuity to the plaintiff's solicitor to be cancelled." Your lordships will observe that that decree is, apparently, entirely opposed to the statement of the Vice-Chancellor, which I have just read, that he should not feel himself able, in the state of the evidence before him, to make any decree reaching the real estate.

However, my lords, in that state of things an appeal against the decision of the Vice-Chancellor was brought before the Court of Appeal in Chancery in Ireland. When it came on the infant had died, and his father, succeeding to him as his heir-at-law, filled a position different from that which he had filled at the first hearing. At the first hearing 50 [he was trustee of the annuity in question for his son the infant. At the hearing upon the appeal, he was the person wholly interested in the subject-matter of the suit, and of course was *sui juris* to take whatever course he might think right with regard to the cause. He might, of course, have insisted upon this objection which had been taken before the Vice-Chancellor. I apprehend it is clear that if he had insisted upon the objection, the case would have stood over for a few days, and the will would have been proved in the usual manner. It became at your lordships' bar a matter of controversy whether the objection was or was not taken before the Court of Appeal. Under those circumstances, your lordships had a communication made with the learned judges of the Court of Appeal in Ireland, the late Lord Chancellor and Lord Justice Christian, and the result of that communication was a very clear expression of opinion on the part of those learned judges that the objection had not been taken before them, and that if it had been taken, they, as a matter of course, would have given an opportunity for the formal proof of the will.

Now, my lords, this objection attempted to be raised at your lordships' bar appeared to me, and certainly I think it appeared also to your lordships, to be an objection purely of form and not of substance. I say that for this reason;

the will of the testator was dated the 28th of January, 1867, and there was a codicil to the will dated the 2d of February, 1867, the day of the testator's death. Among the witnesses called in the case and examined were one of the two attesting witnesses of the will and both of the attesting witnesses of the codicil. The attesting witnesses were persons of station and respectability; they were a stipendiary magistrate, a physician, the householder of the house in which the testator lived, and the fourth, I think, appears to have been a churchwarden of the parish. The three who were called were called for other purposes connected with the merits of the case, but no question whatever was asked of them with regard to the will or the competency of the testator. As to the *factum* of the will, that was assumed on both sides. As to the competency of the testator, the appellant of course vouches for the competency of the testator in the year 1864, when the deed in question was executed. And I observe also, that in his answer he entirely *vouches [5] for the competency of the testator on the 25th of January, 1867, that is to say, three days before the will was made; because he relies upon a letter of the testator written on that day, of which letter he speaks as expressing the mind and purpose of the testator at that time. Under those circumstances I think your lordships will be of opinion, as indeed you were of opinion during the argument, that the objection was one of the merest form. And when you find that the appellant, the *dominus litis*, as far as his defence was concerned before the Court of Appeal in Ireland, had it in his power to take this objection, which had been present to the mind of his counsel in the primary court, but which failed to be taken or insisted upon in the Court of Appeal, I think your lordships would, under any circumstances, be loth to allow such an objection to prevail upon the hearing of the appeal before your lordships. And being of that opinion, your lordships considered that the appeal should proceed and be heard upon the merits.

My lords, I have gone into this detail lest it should appear that your lordships had not given full consideration to the objection which was taken, and had not carefully examined into it; because I own that, *prima facie*, until this explanation was given of the circumstances of the case, it would appear that a very great oversight had been committed in the first instance in the Court of Chancery in Ireland in not requiring the ordinary proof of the will to be given.

My lords, I now come to the substance of the case: [His lordship then went into all the details of the case, and, de-

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declaring his opinion that certain statements in the bill affecting the conduct of the Hilliard family ought never to have been made, he added that he thought the deed of annuity had been obtained under circumstances of influence and of irregularity that rendered it impossible for the court to maintain it, and therefore he moved that "the appeal be dismissed with costs."]

LORD CHELMSFORD: This case, as originally presented to the court, was full of charges of gross fraud committed by Mr. Osborne Hilliard. These having been either not proved or disproved, so much of the bill as contained these unfounded 52] charges was very properly dismissed with *costs. The appellant has argued before your lordships that these parts of the bill having been struck out, nothing remains in the way of allegation in the bill which will serve as the foundation for the decree pronouncing the deed of annuity to be fraudulent and void. But it appears to me that there is quite sufficient left in the bill to raise the two questions which are to be determined by your lordships. These questions are those which relate to the making of the annuity deed, and to the consequent validity or invalidity of that instrument. [On these questions his lordship went minutely through the evidence, and expressed his full concurrence with the decision of the Court of Chancery in Ireland, that the annuity deed was invalid.]

LORD HATHERLEY: My lords, after the very full analysis this case has received from my noble and learned friends, I have scarcely a word to add, beyond expressing my concurrence in the opinion of the noble and learned lords who have preceded me.

I think it due to the appellant in this case to express my concurrence especially in the observations which were made by my noble and learned friend beside me (Lord Chelmsford) at the commencement of his address to the house, namely, in the expression of regret that numerous charges of a very improper character should have been inserted in the bill which the respondent filed in this cause. They have been very properly struck out, and relief has been denied in respect of any of those charges, inasmuch as they were not proved, and in some cases they were positively disproved. And I am very glad that, at the hearing of this appeal at the bar of this house, Mr. Pearson very properly, on the part of his clients, expressed their regret that those charges had ever been inserted in the bill. But, my lords, at this period of the day I will not pursue that point farther. It is, however, idle to pretend that by the introduction of those

charges the case was brought within the rule in *Harrison v. Guest* ('). There remains, *unfortunately, quite suffi- [53
cient to compel your lordships' house to say that it is im-
possible that this deed can stand: [His lordship here stated
the circumstances which led him to that conclusion, and ex-
pressed his full concurrence with the judgment which had
been proposed to the house.]

LORD SELBORNE entirely concurred.

Decree and order affirmed and appeal dismissed with costs.

Lords' Journals, 27th April, 1874.

Solicitor for the appellant: *E. T. Lewis.*

Solicitors for the respondent: *Woodroffe & Plaskett.*

(¹) 8 H. L. C., 481. See *Archbold v. The Commissioners of Requests for Ire-* without those charges of fraud the bill
land, 2 H. L. C., 440, 460, where, because did not present matter sufficient to call
for the interference of the court, it was
fraud was alleged but not proved, and dismissed.

[Law Reports, 7 House of Lords, 53.]

April 30; May 1, 4, 1874.

ROWLAND BURRARD COOPER, THE REV. R. L. DASHWOOD,
and EDITH THERESA his Wife, Appellants; and WILLIAM
HENRY COOPER, Respondent.

Deed—Will—Election—Married Woman—Next of Kin—Practices.

The rule of the Statute of Distributions which requires the conversion of an intestate's estate into money, is introduced simply for the benefit of creditors, and the facility of division among the next of kin. But, as regards the substantial title to property, the right of the next of kin (subject only to the claims of creditors) is complete.

A residuary legatee under a will has a clear and tangible interest in the residue, and the Statute of Distributions being nothing but a will made by the legislature for an intestate, his next of kin stand, with regard to his personal estate, in the same condition as does a residuary legatee under a will:

Both may therefore be subject to the rule of election.

In these respects a creditor does not resemble either.

A married woman cannot declare an election. An inquiry was therefore directed in the case of a married woman (one of two next of kin required to elect) for the purpose of ascertaining whether it was for her benefit and the benefit of her children to take under or against a will.

A. gave a certain estate, P. H. (together with personal property), to trustees on trust, after his widow's death, to sell, and hold the proceeds, with his other property, in trust for any one of his children in such form and *manner as his widow, be- [54
fore a certain fixed period, should appoint. A. died, leaving three sons, W. H., R. E., and F. J. Before the expiration of the fixed period the widow executed a deed by which, after disposing of other property, she directed the proceeds of P. H. to be divided equally among the three sons. The deed reserved to her a power of revocation. She afterwards, believing that she still possessed power to dispose of the estate, made a will, by which she gave this estate of P. H. to W. H., the eldest son, and then, by different successive codicils, gave benefits to the other two sons, and a

special legacy to each of the two children of R. E. (the only one of the three sons of the original testator who had married). R. E. died before his mother, and died intestate. On her death a suit was instituted, in which it was declared that, so far as the estate of P. H. was concerned, her will (which could only speak from the date of her death, and therefore long after the expiration of the period fixed for the making of the appointment) was inoperative. W. H. then filed a bill to compel the two children of R. E., and also his youngest brother, F. J., to elect between their claims under the deed of appointment and under the will and codicils. F. J. submitted; the two children of R. E. resisted:

Held, that their rights under the deed of appointment, though derived through their father, were exactly the same as were those of F. J., and that they were bound to elect:

Held, also, that the special legacies to the two children of R. E., though given to them by name, and given before his death, must be taken into account together with the interest which they derived through him as his next of kin, the whole of the benefits to be taken under the two titles being subject to election.

A special direction was inserted in the order of the house as to the mode of taking the account with reference to the administration of the estate of R. E.

THIS was an appeal against a decision of the Lords Justices (¹), by which a previous decision of Vice-Chancellor Stuart (²) had been reversed.

Mr. W. H. Cooper was possessed, together with much other property, of an estate called Pain's Hill, near Cobham, in Surrey. He had three sons, William Henry, Rowland Edward, and Frederick John. By his will, dated the 30th of May, 1840, he gave his estate called Pain's Hill to trustees in trust to pay the rents, &c., to his widow for her life, and after her death to sell the same, and hold the proceeds, together with the proceeds of his other property, as his personal estate, in trust for any one or more of his children, grandchildren, &c., in such form and manner and in such proportions as his widow, "at any time or times, and from 55] *time to time, before each and every of my said children shall have attained the age of twenty-five years, by any deed, &c., in writing, shall, either absolutely, or with powers of revocation and new appointment, direct, limit, or appoint." The testator died in September, 1840. His eldest son William Henry became twenty-one in November, 1840; his second son Rowland Edward in July, 1845; and his third son Frederick John in October, 1847.

On the 5th of April, 1841 (and therefore before any of the sons had attained twenty-five), Mrs. Cooper, the widow, executed a deed of appointment, which recited that her husband had created certain trusts of Pain's Hill estate for her benefit, and had given it "subject thereto to go along with the residue of his real and personal estates, property, and effects," and that the trustees were to invest the proceeds subject to any appointment she might, before every of the testator's children had attained twenty-five, make, by any deed in writing, absolutely or with power of revocation.

(¹) Law Rep., 6 Ch. Ap., 15.

(²) Law Rep., 6 Ch. Ap., 16, n.

She then, after providing certain specific sums for investment for her three sons, gave the residue (which included the proceeds of the Pain's Hill estate) in trust for all the three sons equally to be divided among them, their executors, administrators, &c.; she then reserved to herself a power of revocation.

On the 10th of April, 1841, Mrs. Cooper made a will, by which, treating herself as still having complete disposing power over Pain's Hill estate, she gave it by name to her eldest son William Henry, absolutely. She afterwards made several codicils, varying some of the dispositions she had made of different portions of the property.

In July, 1845, Rowland Edward, the second son, married, and by this marriage he had two children, Rowland Burrard, born in July, 1846, and Edith Theresa, born in January, 1848. His wife died in February, 1849. He himself died in September, 1858, intestate, his mother, Mrs. Harriet Cooper, being still alive.

By a codicil dated the 1st of December, 1852, the testatrix confirmed her will so far as the gift of the estate of Pain's Hill to her eldest son William Henry Cooper was concerned, but in all other respects revoked her will. And in the same codicil, after many other bequests, she gave to the trustees the sum of £1,000 upon trust to invest the same as therein mentioned, and to apply the *income thereof [56 towards the maintenance and education of her grandson Rowland Burrard Cooper (whether his father should or should not be of ability to maintain him) until he should attain twenty-one, and then transfer the principal to him. In case he should die under twenty-one the income was to be applied in like manner towards the education and maintenance of her granddaughter Edith Theresa Cooper (now Dashwood, one of the appellants) till twenty-one or marriage, and then to be transferred to her for her sole and separate use. She then gave a farther sum of £1,000 in exactly the same terms for the education and maintenance of Edith Theresa Cooper, with the like directions in case of her death for transfer to the use of Rowland Burrard Cooper.

She made four other codicils, by one of which (made after the death of her son Rowland Edward) she recited that by a previous codicil she had given her real estate in thirds to her three sons, she revoked the devise of one-third to Rowland Edward and devised two equal third parts of the same share of her real and residuary personal estate equally between his two children (the present appellants), and the

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remaining third equally between her own two sons William Henry and Frederick John.

Mrs. Harriet Cooper died in May, 1863, and disputes arising as to the effect of the deed of appointment, and of the will, and the various codicils of Mrs. Harriet Cooper, under all of which interests could be claimed by her children and grandchildren, a bill was filed in September, 1863, and the cause was heard before Vice-Chancellor Stuart, whose decision was taken by appeal before the Lords Justices, who, in November, 1867, pronounced a decree⁽¹⁾ to the effect that the will not having come into operation until the death of the testatrix, and therefore after the prescribed period during which she had power to appoint, could not take effect as a new appointment under the power, and that the proceeds of the sale of Pain's Hill belonged in thirds under the deed of the 5th of April, 1841, to William Henry, to the next of kin of Rowland Edward and to Frederick John.

William Henry then filed this bill to put the appellants, Rowland Burrard Cooper and Edith Theresa (now the wife of the Rev. R. L. Dashwood) the children of Rowland Edward [57] ward, and also *Frederick John, the youngest son of the testator, to their election. Vice-Chancellor Stuart decided that there was no case of election. The Lords Justices reversed that decision⁽²⁾, and this appeal was then brought.

Mr. *Dickinson*, Q.C., and Mr. *Fry*, Q.C., (Mr. *T. Rawlinson* was with them), for the appellants, the children of Rowland Edward Cooper and Mrs. Dashwood: There was no case of election here. It was the intention of the testator to convert his real into personal estate, and the interest of the children of the testator was therefore an interest to take such part of his personal estate as, apportioned to each, might remain after payment of his debts and legacies. The right of each child was by the deed of appointment limited to a third. One of these children married, had two children, the present appellants, and then died intestate. These two children are his next of kin. The interest of a next of kin in the personal estate of an intestate is an undefined and intangible interest, it is a right merely to have the estate converted into money, in that respect resembling that of a residuary legatee, as to whom, in *Lady Cavan v. Pulteney* ⁽³⁾, it is said that "a residuary legatee is entitled only to what remains after the debts are discharged," it is not something definite and ascertained which can be set against a clear gift of a specific benefit under a will. It is not, there-

⁽¹⁾ *Cooper v. Martin*, Law Rep., 3 Ch. Ap., 47.

⁽²⁾ Law Rep., 6 Ch. Ap., 15.

⁽³⁾ 2 Ves. Jun., 544.

fore, the subject of election, else a creditor of the intestate, entitled to be satisfied out of what should come to the intestate under a gift of personalty, might be put to his election; which could never be permitted.

Here, too, the deed of appointment and the will were not brought into direct conflict, for in the case of *Cooper v. Martin* ⁽¹⁾ it had been decided that, so far as respected the part of the testator's property dealt with by the deed of appointment, the will was inoperative. The two instruments, therefore, had no direct relation to each other, one was valid the other invalid, and consequently no election could be called for as between them. The invalid appointment under the will of the testatrix must stand by itself—*or fall by itself; [58 it had fallen, for it had been declared inoperative, and it cannot therefore affect other gifts by a different instrument which are valid. A court of equity will not compel a legatee lawfully entitled to take other benefits, even under one and the same instrument, where the gift of those other benefits is perfectly valid, to give effect to an invalid appointment and so abandon the other gifts which are perfectly valid: *Churchill v. Churchill* ⁽²⁾. And no person is bound to elect without a clear knowledge of the funds between the acceptance of which he is to choose: *Whistler v. Webster* ⁽³⁾; nor does any rule as to election arise, except as between a gift under a will, and a claim *dehors* the will and adverse to it: *Wollaston v. King* ⁽⁴⁾; which supposes valid instruments, a deed and a will, to be in opposition to each other. There is none such here, for the will has already been declared to be inoperative as to that part in which, dealing with the Pain's Hill estate, it is inconsistent with the deed.

The appellants had interests here that never could be subject to the rule of election. Such were the gifts of the two sums, of £1,000 each, given to them by one of the codicils. These were absolute gifts, entirely within the power of the testatrix to make; totally independent of any rights possessed by the appellants' father. She had no intention that they should, in any way, be connected together; they were given by a codicil made while their father was still alive; and when, being alive, he had a vested interest in the third of the proceeds of the Pain's Hill estate, and they had no interest whatever in those proceeds. As to these gifts, therefore, there could be no obligation, implied or otherwise, for the appellants to elect between them and gifts to their father which might never come into their possession.

(1) Law Rep., 3 Ch. Ap., 47.

(2) Law Rep., 5 Eq., 44-50.

(3) 2 Ves. Jun., 371.

(4) Law Rep., 8 Eq., 165.

It is not enough to say that the gifts under the deed of appointment and under the testatrix's will were inconsistent with each other. The rule of election is not necessarily to be applied to such gifts. In *Lady Cavan v. Pulteney* ⁽¹⁾ a tenant in tail of certain estates, remainder in tail to B., the wife of C., thinking that he, the tenant in tail, had the fee, made leases exceeding his power. By will he devised these 59] estates (with others) to *B. for life, remainder to D., and he gave to C. certain interests in his personal estate, and the residue to D. After his death D. filed a bill to have the will established. B. elected to take her estate tail in opposition to the will. After her death, C., her husband, who had received certain benefits under the will, claimed to take her estate as tenant by the curtesy, and brought ejectments against the lessees. It was held that the lessees were not entitled to stop the ejectments, nor was D. entitled to put C. to his election. This decision was adhered to after farther consideration ⁽²⁾. And even when one of two benefits is given to a particular person by the same instrument it does not follow that he will be put to his election, or even be allowed the power to elect; the person to confer the benefit may be the person to decide what shall be done: *Wilson v. Wilson* ⁽³⁾; so that the creation of two inconsistent advantages does not necessarily bring with it the obligation to elect.

Here, too, no case of election arises, for the share of the proceeds of Pain's Hill estate is not given to the appellants, it was given to their father—they can only claim under a derivative title, which is not properly the subject of election.

In *Grissell v. Swinhoe* ⁽⁴⁾ a testator being entitled under a settlement, subject to a life interest, to a moiety of a fund by his will recited that he was under the settlement, "subject to the trusts therein contained," entitled to the whole fund, and he purported to bequeath the whole, and gave one moiety to the husband of a lady really entitled to it in her own right, and the other moiety to the husband of his own daughter. On the death of the former lady her husband claimed the moiety which properly belonged to her, and one half of the other moiety under the will, and it was held that he was not bound to elect, for that his claim to the first moiety was as representative of his wife, and consequently was founded on a derivative title. That case was quoted in argument upon the present case in the court

⁽¹⁾ 2 Ves. Jun., 544.

⁽²⁾ 3 Ves. Jun., 384.

⁽³⁾ 1 Dr. & Sm., 152; 19 L. J. (Ch.), 279.

⁽⁴⁾ Law Rep., 7 Eq., 291.

below (1), but Lord Justice James treated it as distinguishable on the ground that there "the legatee's title did not exist at the death, but was a *derivative title through the [60 title of another person who was the true owner at the death." The distinction cannot be sustained, for here the title was a derivative title, and was so at the time of the death.

There is no doubt as to the general principle, that the same person cannot take under a will and against it, and therefore no question is raised upon those cases where that principle has been declared. But this case does not fall within their operation.

There was not here any intention on the part of the testator to impose an obligation to elect, and without it a case of election on a testamentary instrument does not arise: *Dillon v. Parker* (2); *Crosbie v. Murray* (3).

The form of the decree is erroneous in the direction given as to taking the accounts (4).

Mr. *Greene*, Q.C., and Mr. *Bristowe*, Q.C. (Mr. *Kekewich* was with them), for the respondents: This is a case in which the rule of election necessarily arises: *Noys v. Mor-daunt* (5); *Streatfield v. Streatfield* (6). There must *be [61 something given instead of what is intended to be taken away; and there must be something taken away before that which is given can be appropriated. This case meets both branches of the proposition, and exhibits an instance of the existence of circumstances which really constitute the power

(1) Law Rep., 6 Ch., Ap., 19-21.

(2) 1 Swanst., 359, and notes; 1 Cl. & F., 303.

(3) 1 Ves. Jun., 555.

(4) The decree, after referring to and adopting the orders made in the case of *Cooper v. Martin*, in the matter of the Pain's Hill estate, and the proceeds of the sale thereof, went on thus: "And that the defendants, Rowland Burrard Cooper, and Robert Lawes Dashwood, and Edith Theresa his wife, are bound to elect between the benefits conferred on them by the will and codicils of the testatrix, Harriet Cooper, on the one hand, and the respective shares of the defendants, R. B. Cooper and E. T. Dashwood, as two of the next of kin of R. E. Cooper deceased, or so much of the clear residuary personal estate of the said R. E. Cooper as represents those parts of the proceeds of the sale of the Pain's Hill estate which were appointed to him by the deed-poll of the 5th day of April, 1841, on the other

hand. And their lordships do order that for the purposes of such election to be made by the defendants, R. B. Cooper and E. T. Dashwood, the clear residuary personal estate of R. E. Cooper be considered as it was at the death of the said testatrix, Harriet Cooper. And in ascertaining the aforesaid clear shares therein of the said defendants, R. B. Cooper and E. T. Dashwood, the debts and funeral expenses of the said R. E. Cooper, and the expenses of administering to his estate not discharged at the death of the said Harriet Cooper, the testatrix, are to be treated as apportioned ratably between those parts of the proceeds of the sale of the Pain's Hill estate so appointed as aforesaid and the rest of his general personal estate in proportion to their respective shares or amounts." The costs were ordered to be paid out of the estate of the testatrix.

(5) 2 Vern., 581.

(6) Cas. t. Talb., 176.

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to impose on some party the necessity of undergoing a sacrifice, and on another that of making an election. The principles governing cases in which election must be made were stated in *Thelluson v. Woodford* (1), and they are adopted and enforced by Lord Redesdale in *Moore v. Butler* (2), and *Birmingham v. Kirwan* (3), and they have never been disputed. Here the property given by the deed was fully and completely given, the right of the testatrix to dispose of it had, by mere lapse of time, been lost. The subsequent attempt by her to dispose of it, in a different manner, when her power was at an end, was an attempt to dispose of property over which she had no disposing right or power. The necessity of election was, therefore, by her acts imposed on those she intended to benefit. The two instruments were not consistent with each other, and the persons who claimed benefits under both became, therefore, liable to elect which of the two sets of benefits they would prefer to take. This necessity of election has been enforced in courts of equity as the means of fairly arranging the inconsistent interests of parties who, by the error or the wilfulness of a testator, are placed in a position where to give a double benefit to one would be to work an injustice to the other. Not only may a person to whom benefits are given by different instruments emanating from the same donor be compelled to elect, but a person may enter into a covenant which, upon certain events happening, will compel him to elect between what he possesses and what he may acquire. Thus, where a young lady on her marriage (being then only a minor) executed a settlement as to certain property which she then possessed, and also entered into a covenant to settle after-acquired property, and long after her marriage became possessed, by bequest, of other property for her separate use, she was held bound to bring the after-acquired property into settlement, or to make compensation for particular benefits given to her by the settlement: *Willoughby v. Middleton* (4).

[62] *The interest of the respondents, in respect of their claim as next of kin of their father, to share in the proceeds of the sale of Pain's Hill estate is a clear, definite, and tangible interest. It is not properly described as a contingent interest coming to the next of kin only after other interests and other rights have been satisfied, and dependent therefore on them. The title to it vested in them absolutely on the death of their father, though the profitable enjoyment of it might be postponed. It came to them by operation of

(1) 13 Ves., 220.

(2) 2 Sch. & Lef., 249-267.

(3) 2 Sch. & Lef., 444-449.

(4) 2 J. & H., 344; 31 L. J. (Ch.), 683.

law as directly and distinctly as it could have come under the plain and absolute words of a will. They stood in the same situation as residuary legatees, and as these may, in fact, gain nothing, because debts may absorb the whole estate; so next of kin may equally and from the same cause obtain no benefit. But their legal title to the property is the same. Their case, therefore, does in no way resemble that of creditors, who have no distinct title to the property, but have only a right to be paid out of it. It follows, therefore, that though a creditor cannot be put to election, the next of kin may; and in this case they must elect to take as next of kin of the intestate under the deed, or to take in preference the benefits which they may expect under the will of the testatrix.

The appellants are not relieved from the necessity of electing because their title to a share of Pain's Hill estate is derivative through their father; it was not derivative at the death of the testatrix, it had become vested in them upon the death of their father. Upon that event they stood exactly in his position, exactly in the position in which their uncle Frederick John stood, and stands, and the same principle which obliges him to elect, applies equally to them.

They are bound to bring the two legacies into account, for those legacies are benefits given under the will, which is inconsistent with the deed, and they are bound to elect between the whole of their benefits under the two titles. What was the intention of the testatrix is, upon this subject, of no importance whatever.

Mr. *Dickinson* replied.

The LORD CHANCELLOR (Lord Cairns), after fully stating the facts of the case, said: My lords, in that state of things, the testatrix not owning *Pain's Hill, and having no [63 disposing power over it, her attempt to dispose of it by her will clearly would raise a case of election against any person who, taking under her will, might be found to have an interest in the Pain's Hill estate. And before I examine the effect which that principle would have upon the appellants in this case, I would take the liberty of reminding your lordships of two expressions of the general rule of the court on this subject, the one contained in the case of *Streatfield v. Streatfield* ⁽¹⁾, and expressed by Lord Talbot, and the other in the case of *Noys v. Mordaunt* ⁽²⁾, expressed by Lord Keeper Cowper. Lord Talbot says ⁽¹⁾: "When a man

⁽¹⁾ Cas. t. Talb., 176.

⁽²⁾ Cas. t. Talb., 182-3.

⁽²⁾ 2 Vern., 581.

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takes upon him to devise what he had no power over, upon a supposition that his will will be acquiesced under, this court compels the devisee, if he will take advantage of the will, to take entirely, but not partially, under it, as was done in *Noys v. Mordaunt*, there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor hath made;" and Lord Keeper Cowper says⁽¹⁾, in the earlier case of *Noys v. Mordaunt*, "In all cases of this kind, where a man is disposing of his estate amongst his children, and gives to one fee simple lands, and to another lands entailed or under settlement, it is upon an implied condition that each party acquit and release the other."

Now, my lords, in addition to what I have already said, I should remind your lordships that at the time when the will of this testatrix was made all the sons were alive. At the time the principal codicil was made Rowland Edward had died, and died, as I have already said, intestate, and by that codicil large pecuniary benefits were given to the appellants in this case. Large benefits were also given to Frederick John Cooper, the youngest son of the testator. As regards, therefore, the persons interested in the proceeds of the sale of the Pain's Hill estate, your lordships will observe that the eldest son would take Pain's Hill by the will, and would take one-third of the proceeds of Pain's Hill under the appointment. As to him, therefore, no question with regard to election would be material. As regards the youngest son, he would take one-third of the proceeds of the 64] *Pain's Hill estate under the appointment by deed, and he would take pecuniary benefits, which need not be specified, under the will. As to him, in the suit in which the present decree was made a case of election was, under the circumstances, insisted upon by the bill. Effect was given to that case of election by the decree, and from that decree, as to him, there is no appeal. And, my lords, in truth I apprehend there could be no appeal. In point of form, no doubt, what he was entitled to by the appointment was one-third of the proceeds of the sale of Pain's Hill, and not one-third of Pain's Hill in specie; but that I think your lordships will consider to be mere matter of form. In point of substance, and in truth, whether he took the land as land, or took it in the shape of money arising from the sale of the land, is utterly immaterial. In the eye of the Court of Equity he was, in substance, the owner of one-third of the Pain's Hill estate, and, as such, he was clearly bound to

(1) 2 Vern., 582.

elect between that right under the appointment and the benefits given by the will.

That, my lords, brings us to the remaining third of the Pain's Hill estate. The second son had died intestate—the one-third to which, had he lived, he would have been entitled, was part of his estate as an intestate. The case may be considered as if there had only been one next of kin, for the circumstance that we have here to deal with two out of four persons taking the intestate's estate⁽¹⁾, is entirely immaterial as to the principle. My lords, if there had been one next of kin entitled to this one-third of the proceeds of the sale of the Pain's Hill estate, subject only to the payment of the debts and the administration expenses of the intestate, I apprehend that your lordships would have no difficulty in arriving at the conclusion that just as the third son was, in substance, the owner of one-third of the Pain's Hill estate, so in substance, this sole next of kin of the second son was the owner of the remaining third, subject only to the payment of the debts and expenses.

My lords, it was very much pressed on your lordships, in the extremely able argument we heard at the bar from the counsel for the appellants, that the interests of a next of kin in the estate *of an intestate is an undefined and intan- [65 gible interest, that it is a right merely to have the estate converted into money and to receive a payment in money after the debts and expenses are discharged. My lords, no doubt the right of a next of kin is a right which can only be asserted by calling upon the administrator to perform his duty, and the performance of the duty of the administrator may require the conversion of the estate into money for the purpose of paying debts and legacies. But I apprehend that the rule of law, or the rule laid down by the statute, which requires the conversion of an intestate's estate into money, is a rule introduced simply for the benefit of creditors, and for the facility of division. For the benefit of creditors, and for the facility of division among the next of kin, the estate is to be turned into money, but as regards substantial proprietorship the right of the next of kin remains clear to every item forming the personal estate of the intestate, subject only to those paramount claims of creditors.

My lords, this right of the next of kin I find extremely well expressed in a book, which, on this subject, is a book of high authority—*Bacon's Abridgment*—in the part of it

(1) Rowland Edward, the second son, wife and one child him surviving. But had married a second time, and left his they were not parties to this suit.

which treats of executors and administrators. Speaking of the right of the next of kin, and of the statute regulating the succession to an intestate's estate, it says on the clause of the statute which directs that no distribution shall be within a year after the death of the intestate⁽¹⁾: "It hath been adjudged that if a person entitled to a distributive share dies within the year, yet it is such an estate vested in him as shall go to his executor or administrator, for the statute doth not make any suspension, or condition precedent to the interest of the parties, but it is a clause merely for the benefit of creditors; also this statute, being in nature of a will for all persons who die intestate, ought in this instance to be resembled to the case of a residuary legatee, in which it is always holden, that if such a legatee die before the debts are satisfied, so that it doth not appear to how much the surplus will amount, yet the executor or administrator of such a legatee shall have the whole residue, &c., which remains over and not the executor of the first testator."

My lords, I apprehend that really goes far to dispose of 66] this *argument on the part of the appellants. If we look on the Statute of Distributions, as I think we ought to look on it, as in substance nothing more than a will made by the legislature for the intestate, and liken this to the case of a person having made a will and having directed his debts and expenses to be paid, and having given over his clear residue to his three children and his widow—if, I say, we look at the case as if it had assumed these features, I apprehend your lordships will be perfectly clear that the residuary legatees under such a will had a clear and tangible interest in specie in the Pain's Hill estate, just in the same way as the youngest of the three brothers, Frederick John, who directly took one-third of the proceeds of the estate.

The appellants contended, with great ingenuity and skill, that if this were so, your lordships could not stop short of the conclusion of holding that if you found, at the time the succession of this testatrix opened, a creditor of the second son, who had been paid his debt, and who therefore was in possession, or who without payment of his debt, might have claimed to be put in possession, of a certain portion of the intestate's estate, in order to satisfy his claim, you would be obliged to hold, supposing he had received a benefit under the will of the testatrix, that he also would be obliged to elect between that benefit and the portion of the intestate's

(1) Tit. Exors. & Admors. I., s. 4, vol. iii., p. 75.

estate which might be required for the payment of his debt. My lords, I apprehend the two cases are perfectly distinct; and I would suggest to your lordships a test which will at once show the difference between them. Can any person doubt but that one of these next of kin might, before the administration of the estate of the intestate, have released to another next of kin, or have assigned to a third party, his interest in any specific portion of the estate of the intestate, in any specific item of the estate of the intestate, subject only to that item bearing its share of the administration expenses? I apprehend it to be quite clear that a next of kin could take that course. But, my lords, could a creditor do so? Could a creditor, before payment of his debt, say, I will release to you, or I will assign to you my interest in such an item of the estate of the intestate? Clearly a creditor could do nothing of the kind. He is a person who has no interest whatever in any specific portion of the estate of the intestate. He *has a personal claim merely for the [67] payment of his debt, to which effect might be given, and would no doubt be given in the proper court, by securing the assets and obtaining payment for him out of the assets.

My lords, that disposes, I think, if your lordships take that view, of the main question which was argued at the bar. The two children, who are two of the next of kin of the second brother (their father), take benefits under the will:—they also take, in substance, an interest in an aliquot share of the proceeds of the sale of the Pain's Hill estate as next of kin of their father, and they must elect between their interest under the will and their interest which would be in opposition to the will.

But, my lords, it was then said that at all events if they elect they must only elect between that interest which they take under the codicil to the will of the testatrix made after their father had died, and need not take into account in election a legacy of £1,000 which had been given to each by the will of the testatrix made before their father died. My lords, I can see no ground for any such distinction. It appears to me that the rule is a rule, as it was expressed by Lord Talbot, calling on them to elect between the whole of their benefits under the two titles under which they claim, and that no distinction is to be made founded on some supposed intention or absence of intention on the part of the testatrix when she made one or other of her two testamentary dispositions. The rule, as was said during the argument at the bar, does not proceed either upon an expressed

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intention, or upon a conjecture of a presumed intention, but it proceeds on a rule of equity founded upon the highest principles of equity, and as to which the court does not occupy itself in finding out whether the rule was present or was not present to the mind of the party making the will.

My lords, that would exhaust the case, except that I must call your lordships' attention to two provisions, or, rather, to one provision, of the decree, and to the absence of another provision which, as it appears to me, ought to be found there. My lords, I do not find in the decree any direction with regard to one of the appellants, who is a married woman, and who cannot make an election for herself. 68] As to that, I think your lordships will be of *opinion that, following the ordinary course, there should be an inquiry made whether it would be for the benefit of Edith Theresa Dashwood and her children to take under the provisions of the will and codicils, or against the same.

Then, my lords, the Lords Justices appear to have thought that inasmuch as before the share of the appellants in the proceeds of the Pain's Hill estate could be ascertained, there must be a deduction made in respect of the debts of the intestate which might be paid out of those proceeds, those debts should be looked at as at the date of the death of the testatrix, and according as at that moment they had been paid out of one or other portion of the estate of the intestate, so the account, for the purpose of the election, should be taken. But I think your lordships will rather be of opinion that the proper course would have been to apportion all the debts and all the administration expenses of the intestate over the whole of the assets of the intestate ratably, and in that way to find what proportion of the debts and expenses the Pain's Hill estate ought to have borne. If that is your lordships' opinion, I would suggest that the decree should be varied thus: And their lordships do order that for the purposes of such election, to be made by the defendant, Rowland Barrard Cooper, and by or on behalf of the said Edith Theresa Dashwood, and for any purpose consequential thereon, the debts and funeral expenses of Rowland Edward Cooper, and the expenses of administering his estate (such expenses, if not yet ascertained, to be estimated), are to be treated as apportioned ratably between those parts of the proceeds of the sale of the Pain's Hill estate so appointed as aforesaid, and the rest of his general personal estate, in proportion to their respective shares or amounts. My lords, if your lordships adopt those alterations in the decree which I have ventured to suggest, I will also suggest to your lord-

ships that the main part of the decree should be affirmed, but that there should be no costs of this appeal on either side.

LORD HATHERLEY: My lords, I entirely concur in the view which has been taken of this case by the noble and learned lord on the woolsack, and he has so fully and clearly stated his view, and the law of the *court with reference [69 to cases of this description, that I have very few words indeed to add to what has been already said on the subject.

I apprehend, my lords, that the difficulty which has been supposed to exist in this case arises, in a great measure, from something which has been thrown out in other cases, and, notably, in the case which was cited before us of *Lady Cavan v. Pulteney* (¹) with reference to the non-application of the doctrine of election to what, in that case, was called a derivative interest. But, my lords, the derivative interest in that case was simply this,—A lady having been put to her election, the question was whether her husband, who was tenant by curtesy in the estate which she elected to take, was again to be put to his election in respect of an interest which he took under the will, and which those who argued for the election said he ought not to be allowed to benefit by, unless he gave up his interest as tenant by the curtesy. I need not discuss that case. Your lordships will see at a glance that the position of the parties was entirely different from that which we have here. We have here the simple case of certain parties in possession, by right, of a fund to which they were entitled by the will of the original testator, and also as legatees under a will of the testator's widow, which latter will affected to dispose, but could not of course effectually dispose, of the interest they possessed under her husband's will. That would, according to all the authorities, be a simple case, in which the testatrix having attempted to dispose of what was not her own, also gave benefits to the persons who, at her decease and at the opening of the testamentary document, and of the succession thereunder, are found to be both legatees under the will, and also owners of the property that she has attempted to dispose of.

Now, my lords, although the law which has for a very long period been laid down on this subject was for a time a little open to doubt and difficulty as to the exact expression which ought to be given of the principle on which it was founded, namely, whether it should be conditional, including, therefore, forfeiture in the event of any one taking

(¹) 2 Ves. Jun., 544.

under a will endeavoring to disappoint it, or should be com-
70] pensative, yet still the main principle was *never disputed, that there is an obligation on him who takes a benefit under a will or other instrument to give full effect to that instrument under which he takes a benefit; and if it be found that that instrument purports to deal with something which it was beyond the power of the donor or settlor to dispose of, but to which effect can be given by the concurrence of him who receives a benefit under the same instrument, the law will impose on him who takes the benefit the obligation of carrying the instrument into full and complete force and effect.

Now, my lords, Mr. Fry, in the course of an ingenious argument, endeavored to take advantage of the expression that this is "an implied obligation," to reason thus with reference especially to a portion of the benefits taken by these present appellants under the will. He said with respect to a portion of these benefits, namely, certain legacies of £1,000, it could not possibly be implied that the testatrix had any intention that those legatees should give up any right connected with their father's interest when they took the benefit of the legacy of £1,000, because at the date of the will no such right existed in them; their father was alive, he it was who was entitled to the subject-matter which is now in question in this suit with regard to election, and not they, and that the testatrix herself indicated on the face of the instrument that she was aware of his existence, and contemplated his existence subsequent to her own decease, regarding him as the person who ultimately would be found to be in possession of the property now sought to be distributed under the doctrine of election. My lords, the fallacy of that is quite obvious. The condition, or rather obligation (which is the expression I prefer, regard being had to the dispute as to condition involving forfeiture), the equitable duty which the law imposes on a person claiming under an instrument, of giving full effect to it, as far as it would be otherwise ineffective, except through his concurrence, is simply this,—the law inquires on the death of the testator, when the will comes into operation, what is his intention, as expressed on the whole will, with reference to the disposition of that which he considers to be his property; and it being found clearly and distinctly (for it must be clearly and distinctly found) that
71] he has expressed his intention of disposing *of what belongs to another—when once that is ascertained completely, there is nothing else which the law implies, with regard to

his intention, beyond the ordinary intent implied in every man who affects by a legal instrument to dispose of property, that he intends all that he has expressed, and, among other things, that he intends to dispose of property as to which he has so expressed an intention, though it really does not belong to him. When once that intention is ascertained there is nothing else remaining to be done, with reference to election, than to see who is in possession and who is the real owner of the property; and if you find him, who is the real owner of the property at the same time taking a benefit under the will which has erroneously endeavored to dispose of his property, then he must give effect to that intention, though founded in error, and give it full effect by either abandoning all his interest under the will, or making compensation to the extent of the value of the disappointed intention of the testator. That being the simple case, you then make no inquiry as to what may be supposed to have been the view as to those particular legacies, say the £1,000, or any other specific legacy under the will, but all that you look at is this, does the person taking under the will any benefit whatsoever, of any kind or shape, possess the power of giving full effect to the will by releasing the interest he has in another subject-matter, which was not the property of the testator, but which was in terms disposed of by the will, and, finding that he has the power of so doing, you fix on him the obligation and duty of doing it.

My lords, that clears the ground very much, I think, as to all argument with reference to the supposed intentions of the testatrix in this respect. But then comes the argument which was exceedingly ably and forcibly put by Mr. Dickinson in the course of the discussion of this case, namely, that that which these appellants take is not a distinct interest, is not the thing given by the testatrix, but is simply a right to have that thing, together with the other assets of the testator, disposed of by the administrator and applied to the payment of the debts of the intestate, and when those debts are paid and satisfied, then the balance (the balance only, and not this matter in specie) comes to the person now called on to elect. I think the noble and learned lord on the *woolsack has so fully met and disposed of that argu- [72 ment, that it would be a waste of your lordships' time for me to pursue it farther. I may be permitted, perhaps, to add another illustration (which is in truth only another way of saying the same thing) to that which the noble and learned lord offered, namely, that,—in addition to the argument founded on the clear power of these persons interested

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in the testatrix's estate, to release their interest and right in this specific property, which has come to them in consequence of their rights under the will of the original testator,—there is a distinction between them and a creditor in this respect, that whereas a creditor could by no circumstance, and by no course taken by him, ever acquire a distinct interest in that particular chattel which is now in question—yet I take it that, whether it was a term of years, whether it was the produce of a sale, or whether it was any other specific chattel belonging to the intestate's estate, if there were a sole next of kin he could, by paying the debt of the intestate and satisfying the funeral and testamentary expenses, require that that property should not be sold and disposed of, and it would then become his alone, entirely and absolutely, in possession. What difference would it make if there were three or four next of kin? If they should choose to undertake the same process, and satisfy all the debts, and say that they desired to have the produce of this Pain's Hill estate, or whatever the specific property might be, what would there be to hinder them from taking that course and acquiring the property? No such course as that would be thought of (because it would be absurd) in the case of a creditor. A creditor would have no right to any particular chattel. All the right the creditors have is to be paid their debts out of that chattel, as well as out of other things; but their position as regards the specific property is wholly different from that of the next of kin.

My lords, I apprehend that there is substantially no difficulty in coming to the conclusion which the noble and learned lord on the woolsack has offered for our acceptance, and which concurs with the conclusion of the Lords Justices. My lords, I also entirely concur with the noble and learned lord in the view he has taken as to the alteration which is necessary to be made in the decree. I think it must have [73] been a slip in the court below, that the debts *of the intestate were directed to be ascertained as they existed at the death of the testatrix, and not as at the death of the intestate, because the interest taken by the next of kin is clearly an interest in every chattel that formed part of the estate of the intestate, subject to the payment, no doubt, of a proportionate part in value of the debts that existed at that time on the part of the intestate. Then, when you have found what is the interest they have, you are in a condition to ascertain what it is that they are bound to give up in case they elect to take under the will. There must also be an inquiry as to whether it will be to the interest of the married

woman to elect. And as we have to make these alterations, which are material ones, in the decree, I concur in the view expressed by the noble and learned lord on the woolsack that there should be no costs of the appeal.

LORD O'HAGAN: My lords, whatever observations I might have been disposed to make upon the very able argument to which we listened at the bar, I certainly conceive that, after the full and exhaustive treatment of the case by the noble lords who have preceded me, I should be quite unwarranted in occupying the public time. I will only say this, that I cordially concur in the view which has been taken of this case; and I should say myself, for my own part, that, but for the division of opinion among the learned judges in the courts below, this case scarcely admitted of doubt or dispute.

There is, in the first place, no controversy about the facts of the case, or about the general law which is applicable to it. There is no controversy, first of all, as to the facts; and as to the general law there can be none. It has been stated very clearly by the noble and learned lord on the woolsack. It is merely this, as expressed in various cases by various judges, that if a person takes under an instrument he must take under the instrument altogether; if he takes a benefit he must bear the burden; if he takes a benefit from a testator, he shall to the best of his power carry out the will of that testator so far as it can be carried out. In the particular case before the House, the conditions necessitating the application of that principle are most clearly fulfilled. We have here an intention, beyond all controversy, to give a property which *the testatrix had no right to give; and [74 we have here an intention to give benefits to a person who had already an interest in that property. That being so, it appears to me, my lords, that the application of the principle of election becomes perfectly inevitable.

I listened with great attention to the various suggestions that were made with great ability and power by the learned counsel for the appellants; but they have not prevailed with me. In the first place, I do not see that there is any distinction in the position of the testatrix here upon the mere ground that she was prevented from doing that which she assumed she could do, by reason of the exhaustion of her power under the deed. Whether she had absolutely nothing to do with the property in any form, or whether she had become disabled to deal with the property in this particular form, appears to me to be quite immaterial. In the same way, it also appears to me to be quite immaterial

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whether the property assumed to be disposed of was realty or personalty, or whether the whole of the property was disposed of, or only an interest in it. All that has been determined so far back as the case of *Birmingham v. Kirwan* ⁽¹⁾ before Lord Redesdale, and the other cases which have been subsequently decided are perfectly clear and conclusive upon the subject.

We had an ingenious suggestion made to us upon a very important part of the case by Mr. Dickinson, and that was with reference to the meaning of the expression of the judges that the intention and meaning of the testator or testatrix must be perfectly clear; that is, quite clear and beyond all controversy. But what is the intention that the court must apprehend upon clear evidence? Not an intention on the part of the testatrix that there shall be an election under certain circumstances. If such a thing were required the whole doctrine of election would be practically put away. A testator or a testatrix does not generally know or understand anything about the doctrine of election, and you cannot find any instrument, perhaps, in which any such intention was expressed. The intention that must be clearly demonstrated in evidence to the court, is an intention to do the particular thing—to give the property which the party has not a right 75] to *give, and to give a benefit to a person who has an interest in the property. The two intentions being ascertained upon clear evidence, the law draws the conclusion. It is a conclusion of equity, and it is not necessary that there should be an intention shown upon evidence which never could be shown upon evidence. Having shown as matters of fact the two intentions to which I have referred, the law draws the conclusion, and there is an end of the matter. And in this case which is now before the House, these two things are as plain as light; there is no controversy, and there could be no controversy, about them at all.

One other matter, my lords, was pressed with great power by Mr. Dickinson, and I think by Mr. Fry also, and that was with reference to the distinction between the character of specific property, and property like this, which is not specific no doubt, but only the residue to be ascertained after judicial inquiry. The noble and learned lord upon the woolsack, together with my noble and learned friend who has last addressed the house, have made that very clear and very demonstrative indeed. If that be so I think, *cadit questio*. I myself ventured to put to one of the learned counsel this question: What would be the result if this,

(¹) 2 Sch. & Lef., 444.

instead of being personalty, as it is said, to be disposed of after inquiry and after ascertainment of the residue, had been realty, and if there had been either a devolution upon a person as heir, or a devise of a portion to that person? The learned counsel candidly admitted that that would not be arguable. If that would not be arguable, and if there be no distinction, as I have been unable to find either in reason or in authority that there is a distinction, between a specific character of property and property which is to be made specific after inquiry, and which must therefore be assumed to be ascertained now, because it can be ascertained and ought to be ascertained according to the course of a court of equity, in that case the admission made by the learned counsel, if the matter be, as I think it is, clear upon the other part of the case, is, in my opinion, demonstrative of the whole matter.

It was also put as a distinction by one of the learned counsel, and pressed very much indeed upon the House, that the derivative character of the property here made a difference. I have been unable to see a distinction between the derivative character of property which comes to the heir by reason of the law just as *much as it comes to the next of kin [76 by reason of the law, and the derivative character of property which comes by devise. In the character of the property in this case, I see no such distinction, and I think that when the authorities are looked to it will be seen that, as in the case of *Grissell v. Swinhoe* (¹), before the Lords Justices, and other cases to which reference has been made, the derivative character of the property regards the period at which the derivation has taken place, whether it be by heirship, or whether it be by devise, as in this particular case. If the property devolves after the death of the testator or testatrix, then the derivative character becomes material to the case. But under the circumstances of this case we have a property to be ascertained, and therefore really ascertained, for the purpose of this argument, before the death of the testatrix, and vested in these people before the death of the testatrix; and therefore this case is wholly different from the case of *Grissell v. Swinhoe*, that was before the learned Lords Justices, and from any other case that can be cited.

Upon this view of it, therefore, I have been unable, after giving the case the best attention in my power, to see that all those suggestions, and some others which were pressed very powerfully upon the house, to distinguish this case

(¹) Law Rep., 7 Eq., 291.

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from the ordinary case in which you must apply the general principle of election, the conditions being fulfilled as they are fulfilled in this case. I am, therefore, my lords, very clearly of opinion that the advice given to the house by the noble and learned lord on the woolsack is fully founded in reason, in law, and in authority; and I also concur in thinking that the alterations which he has suggested in the decree ought to be made. I believe it is necessary for the purposes of justice that the proposed alteration should be made with respect to the debts; but under the circumstances of the case, having regard to the fact that there is certainly something difficult about it, and having regard to the conflict of opinion between the learned judges in the courts below, I concur also that there should not be any costs of this appeal.

LORD MONCREIFF: My lords, I entirely concur in the proposed judgment, and in the reasons which have been so [77] fully given for it, and I should *have contented myself with a simple concurrence, were it not for the very large and wide principles which have been involved in this discussion, and for the very able argument that we have heard at the bar. I shall only, in a very few sentences, indicate the impression, upon some of the more material points, which that argument has made upon my mind.

My lords, when Mrs. Cooper died, and her will came into operation, two separate rights opened to the appellants—one, the right to claim the benefit that was provided by the will; the other the right to frustrate and disappoint the right as to Pain's Hill which the will also contained in favor of the respondent,—at all events, to the extent to which he (the respondent) had been benefited by the appointment which had been previously made. That the appellants were so entitled to frustrate and disappoint the right of the respondent to Pain's Hill I imagine does not admit of question in this case, because they had already claimed the right to do so, and had claimed it successfully in the former suit in chancery, and, indeed, if that had not been the case, this question could not have arisen. The only question, therefore, before your lordships is, whether they can also claim the benefit provided by the will.

My lords, I understand the rule of law to be quite clear and fixed, that such rights are inconsistent, and that both cannot be exercised. The law will not permit a legatee to claim a legacy or a benefit under a will, and at the same time to defeat the intention of the testator in regard to other gifts contained in that will. This rule seems to be quite clear, whether it be carried to the full extent of compelling

the legatee absolutely to hold by the will, or to renounce all benefit under it, which is the full doctrine, or whether it be limited, which I assume to be the case here, to an obligation to make compensation to the donee under the ineffectual gift. The doctrine of election is truly a consequence; it is superinduced upon the principle that the legatee is not to be arbitrarily deprived of either the right to disappoint, or the right to claim, but he must choose between those rights, the fundamental rule being that he cannot exercise both of them.

Now, my lords, of course there must appear a clear intention on the face of the will to convey the property in respect of which *the legatee has it in his full power to frus- [78]trate the intention. I suppose that in this case there is no doubt about that. I do not think it necessary, as none of your lordships have referred to that part of the matter, to refer to the point that was raised in regard to appointment upon the case of *Churchill v. Churchill* ⁽¹⁾. My lords, I should not have thought certainly that the principle was varied, because that which was done was, or professed to be, an appointment under a power, the testatrix not having had the power to appoint in the way and at the time that was attempted. I should not have thought that the principle was varied by arising in that shape. And my opinion is, that it does not arise in that shape in the present case, and that, in reality, the terms of the will are terms which necessarily imply an intention to bestow the property itself.

Then, my lords, beyond that there seems to be no question of intention raised. Every testator intends that his will shall take full effect, and anything that prevents the will from being wholly effectual of course frustrates the intention of the testator to that extent. I cannot concur in the view that was very ably and ingeniously argued, that when it is said it is a question of intention, the meaning is, that the testator must have intended that the legatee, if he challenge or defeat any part of the will, shall be put to his election. That is clearly not so, because that would exclude from the operation of the principle every case in which a testator supposed that he had full power over the property which he professed and attempted to convey. That is contrary to all the authorities. It is quite fixed, I think, that it is wholly immaterial whether the testator thought that he had the power to convey the property, or knowing that he

(¹) Law Rep., 5 Eq., 44.

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had not the power, usurped it. The rule in regard to election is in either case precisely the same.

My lords, in regard to the plea that was maintained on the ground that in this case the right to the property conveyed was derivative, and only incidental to the *universitas* of the succession of Rowland Edward Cooper, I think that has been quite sufficiently dealt with already, indeed wholly exhausted, and I have nothing farther to remark upon it [79] except this, that in the case of *Grissell v. Swinhoe* (1) which was referred to at the bar, the distinction was quite clearly brought out between the double right to take under the will, and to defeat part of its provisions emerging when the will comes into operation, and a subsequent succession to or acquisition of some right which would have that effect after the legacy, or the benefits bestowed by the will, had become unconditionally and fully vested. That is quite a different case; I do not say what the law applicable to it may be. But clearly in this case these two rights only came to coexist at the time when the will came into operation; and therefore the claim to the legacy never arose except subject to the obligation to elect.

My lords, lastly, it is said that in point of fact the appellants here are not the owners of the property that was attempted to be conveyed, but have only a pecuniary claim upon the residue of the succession after the debts are paid. Upon that matter I shall only say that I entirely concur in thinking that the true test is this—whether the appellants are in a condition effectually to elect, in other words, whether if they hold by the benefit conferred by the will, that will have the effect, to the extent of their share or claim upon the estate of Pain's Hill, of permitting it to devolve upon the respondent in terms of the settlement. That it would do so I think there can be no doubt, and therefore I think it is quite clear that they, as far as this question is concerned, are the owners of the property in question.

Order appealed from varied.

The following Order was afterwards entered on the Journals:

It is *ordered* and *adjudged*, by the Lords Spiritual and Temporal, in Parliament assembled, that the order of the Lords Justices of the Court of Appeal in Chancery, of the 11th of January, 1871, complained of in the appeal, be varied as follows, namely, by inserting after the words "appointed to

(1) Law Rep., 7 Eq., 291.

him by the deed-poll of the 5th day of April, 1841, on the other hand," the following words, namely, "And let an inquiry be made whether it will be for the benefit of *the said Edith Theresa [80 Dashwood and her children to take under the provisions of the said will and codicils, or against the same;" and in the ensuing paragraph, by leaving out the word "defendants" and inserting in lieu thereof the word "defendant;" and also in the said paragraph, by inserting after the words "Rowland Burrard Cooper and" the following words "by or on behalf of the said," and by leaving out the words "the clear residuary personal estate of Rowland Edward Cooper be considered as it was at the death of the said testatrix, Harriett Cooper, and that in ascertaining the aforesaid clear shares therein of the defendants Rowland Burrard Cooper and Edith Theresa Dashwood," and inserting the words "and for any purpose consequential thereon," and by leaving out the words "not discharged at the death of the said Harriett Cooper; the testatrix," and inserting the words "(such expenses, if not yet ascertained, to be estimated)": and that the said order, subject to the above-mentioned variations, be, and the same is, hereby affirmed: and that the cause be remitted back to the Court of Chancery, to do therein as shall be just and consistent with these variations and this judgment.

Lords' Journals, 4th May, 1874.

Solicitors for the appellants: *Dimond & Son*.

Solicitors for the respondents: *White, Broughton & White*.

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Beattie v. Lord Ebury.

[Law Reports, 7 House of Lords, 102.]

May 11, 12, 19, 1874.

102] *JOHN BEATTIE and Others, Appellants; and LORD EBURY and Others, Respondents (*).

Railway—Bank—Transfer of Shares—Personal Responsibility of Directors—Practice.

If a man misrepresents a fact, to that fact he is bound, if any other person, misled by such misrepresentation, acts upon it, and thereby suffers damage.

A direction given by persons who are directors of a company to their bankers, when the company had a balance in the hands of the bankers, to honor checks drawn and signed in a particular manner, does not of itself impose on the directors any personal responsibility as to those checks. This direction is in no sense a misrepresentation, so as to make personally liable those who gave it to those who acted upon it.

Nor, though that direction should continue to be acted on by the bankers after the company's account has been overdrawn, will it entail on the directors who gave it any personal liability. Nor will it entail any such liability on those who, at a subsequent meeting of the board of directors, confirmed the minutes of the board meeting at which it was given, and who drew checks in accordance with it, though the account was overdrawn when these latter checks were issued and honored.

Bankers under advances to a railway company made a demand on the directors of the company to deliver to them as "security" for the advances "unissued shares" of the company, and "such preference shares and debentures as you may obtain authority to raise in next session of Parliament." This demand was not construed to mean that the shares and debentures should be paid-up shares and debentures, and the directors by delivering unissued shares and debentures (on which money had not been paid), were not guilty of any misrepresentation, and did not render themselves liable to make good to the bankers those shares and debentures.

Where bankers have demanded and received unissued preference shares of a railway company as "collateral security" for advances they have made on the company's checks, and have been registered on the registry of the company as the holders of such shares, a court of equity will examine into the circumstances of the transaction, and can direct the proper steps to be taken to cancel such registration.

The order of the House directed the officers of the railway company to take all proper measures for cancelling the registration. But the order on the appellants to pay costs was not postponed till the bankers' names had been taken off the register.

THIS was an appeal against a decision of the Lords Justices, by which a previous decision of Vice-Chancellor Bacon had been reversed (*).

103] *The appellants, who represented the Union Bank of London, had sued the respondents, who were the directors of the Watford and Rickmansworth Railway Company, for the amount of certain sums due to the bank on accounts

(*) Modifying 3 Eng. Rep., 625.

(*) Law Rep., 7 Ch. Ap., 777, where the facts and the judgments on the original case and on the appeal to the Lords

Justices are fully given. The judgment of Vice-Chancellor Bacon is given, Law Rep., 7 Ch. Ap., 788, n.

overdrawn by the means of checks, on which, as the appellants contended, the respondents had by their letters and conduct made themselves personally responsible. The letters and the acts of the parties are so fully stated and commented on in the judgments of the noble and learned lords that a detail of them here would be quite useless. The foundation of the claim was a letter dated the 4th of July, 1860, sent in pursuance of a resolution passed at a meeting of the railway directors on that day, at which Messrs. Capel, Cary and Warwick were present. The letter was in these terms:

“To the Directors of the Union Bank of London, or their Manager at the Temple Bar Branch.

“Gentlemen,—

“Watford and Rickmansworth Railway.

“Please to honor the checks of this company signed by two of the directors, and countersigned by the secretary.

“Joseph Cary,

“Reg. Capel,

“J. Warwick.”

At the moment this letter was written the railway company had a balance in the hands of the bankers.

Lord Ebury was present at the next meeting of the railway directors, when the minutes containing the resolution and the letter were confirmed. The resolution was afterwards acted on by the different directors on various occasions.

The railway directors required advances, and borrowed some money from the bankers. The special acts of borrowing appeared to have been made the subjects of special contracts, which were always duly performed; but many checks drawn and signed in accordance with the above resolution were honored, and the general account of the railway company with the bankers came to be considerably overdrawn.

In the course of their dealings with each other, the bankers had more than once required securities to cover these overdrawn accounts, *and had received debentures [104 and preference shares, (“lodged as collateral security”), in respect of which the officials of the bank had been put upon the register of shareholders in the railway.

In March, 1865, the bankers commenced an action in the Court of Common Pleas to recover the debt due from the railway company, and obtained a verdict for the full amount

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claimed. In this action had been included the sums which had been the subject of special and personal contracts with the railway directors, and the verdict and judgment were given for the gross amount of both sets of claims. The money due on the personal contracts of the railway directors was paid, and the original verdict for £32,408 was thus reduced by £9,436, and the bankers sued out an *elegit* against the railway company for the balance (£23,334) due for principal and interest. The writ was lodged with the sheriff of Hertfordshire, who, by a seizure on the property of the railway company, levied and paid to the bankers a sum of £212 18s. 4d.

On the 8th of August, 1868, the bankers filed their bill (amended in August, 1869) against the railway directors and the Watford and Rickmansworth Railway Company, in which the bankers insisted that the directors were personally liable to make good the advances made upon checks authenticated as described in the letter of the 4th of July, 1860, and that they, the bankers, never had any interest in the stocks and shares of the company, except to hold them as collateral security; and they prayed for relief in respect of the debt due to the bank, and also relief from any liability on the shares.

Answers were put in, and evidence taken; and on the 6th of March, 1872, Vice-Chancellor Bacon made a decree declaring the transfer of the shares null, and the entry of the bankers' names on the register improperly made, and also directing that the defendants, the railway directors, should do all such acts as were necessary to effect the cancellation of the transfer. The decree also directed an account of what was due to the bank for advances made to the railway company, and declared the defendants as the directors personally liable to pay what should be found due. The case was taken by appeal before the Lords Justices, who, on the 19th of July, 1872, reversed the order of the Vice-Chancellor, and, (so far as concerned the part relating to the personal liability of [105] *the directors), ordered the bill to be dismissed with costs as to the directors named. This appeal was then brought.

There was no decision in the Lords Justices' Court on that part of the order which directed the cancellation of the registry of the shares.

Mr. Swanston, Q.C., and Mr. T. A. Roberts, for the appellants: The railway company here was in want of funds. The directors made themselves personally responsible in order to obtain them. By their letter to the bankers they

must be taken as having represented themselves clothed with authority to obtain the funds, and to direct that checks drawn in a particular manner were to be honored. If they had no lawful authority to pledge the credit of the company they were guilty of a misrepresentation, on which they induced other people to act, and they were bound to make good their own representations: *Collen v. Wright* (¹). Their own act did not authorize them to do what they pretended to do, and, consequently, what they did was done on their personal responsibility. When asked for securities they handed to the appellants preference shares and debentures, and by so doing bound themselves to make good these securities. That was the principle acted on in *Higgins v. Livingstone*, where Lord Eldon thus stated the ground of such obligation (²): "As to the general liability of parliamentary trustees, if I were to give an opinion, I would say that where persons act under a parliamentary trust, and state themselves as so acting, they are not to be held personally responsible. But this also, I think, rests on strong principle, that as the trustees must know whether there are funds to answer the purpose, they, when they contract with others who do not know, act as if representing that they had a fund applicable to the object, and are then personally bound to provide a fund to pay the contractors." On that principle the respondents here are clearly liable.

It is admitted that if trustees act strictly within the line of their duty, they do not make themselves personally responsible; but, as the Vice-Chancellor said in *Wilson v. Goodman* (³), where they neglect that line and go beyond it, they become personally responsible. The respondents did so here. The case of *Cherry v. Bank of Australasia* (⁴) is directly in point with the present; and *there, because [106 the directors had authorized a person named Clarke to draw a sum of £4,000, when they had no legal power so to authorize him, they were held responsible. So in *Lewis v. Nicholson* (⁵) they were held liable because they represented that they had authority which they did not in reality possess. [LORD O'HAGAN: What misrepresentation do you find in the letter of July?] The direction to honor the checks as if they had full authority so to draw the checks, which at the time they had not, was itself a misrepresentation; it was one intended to induce the appellants to act upon it, and they did act upon it. *Richardson v. Williamson* (⁶) shows that

(¹) 8 El. & Bl., 647.

(²) 4 Dow., 341, 355.

(³) 4 Hare, 54, 62.

(⁴) Law Rep., 3 Pr. Co., 24.

(⁵) 18 Q. B., 503.

(⁶) Law Rep., 6 Q. B., 276.

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if persons induce others to believe that they have power to enter into binding contracts on behalf of third persons when such is not the fact, those who so misrepresent their own powers are bound to make good what they have done. There is a class of cases, all decided on the same principle, of which *Gurney v. Behrend* ⁽¹⁾ is an instance. So where persons have induced others to purchase a bill supposed to be foreign, but which was not so, and for want of a stamp was therefore invalid, the purchaser has been held entitled to recover, the false representation being sufficient to give him that right, even though the person who made it was at the time ignorant of the fact: *Gompertz v. Bartlett* ⁽²⁾; *Young v. Cole* ⁽³⁾. And in *George v. Skivington* ⁽⁴⁾ the same principle was applied to the sale of hair wash, though the person who sold it did not know that it was injurious. In *Parrott v. Eyre* ⁽⁵⁾ the defendant signed, as chairman of a board of road trustees appointed under the provisions of a Road Act, a resolution that the plaintiff (the treasurer) should be requested to make an advance of £1,000 to the board; no bond was given to secure the advance, but the trustees who had requested the advance, though they sent to the plaintiff a signed minute of the resolution by which they made the request, were held to have made themselves personally responsible to him. And a company may make itself liable by adopting an agreement made by one of its promoters: *Williams v. St. George's Harbor Company* ⁽⁶⁾, where proceedings [107] had at first been taken against the individual *promoter, and the company had then taken on itself the responsibility which it was never denied he had incurred.

In this case Lord Justice Mellish laid down the broad proposition that a man was not "liable for making a misrepresentation unless it is a misrepresentation in point of fact, and not merely in point of law" ⁽⁷⁾; but that depends on what is the nature of that misrepresentation. If it is a misrepresentation of a legal right, pretended to be possessed by the person who asserts it, and a man is injured thereby, he may claim compensation. The misrepresentation in itself may be nothing, it may be that of a mere opinion on doctrine, but if it is a misrepresentation as to title, and the rights and character of the parties who make it, and if it is made with the intention of inducing another to act upon it, and it does so induce him to act, and he thereby suffers, he may obtain

⁽¹⁾ 3 El. & Bl., 622.

⁽²⁾ 2 El. & Bl., 849.

⁽³⁾ 3 Bing. N. C., 724.

⁽⁴⁾ Law Rep., 5 Ex., 1.

⁽⁵⁾ 10 Bing., 283.

⁽⁶⁾ 2 De G. & J., 547; 27 L. J. (Ch.), 691.

⁽⁷⁾ Law Rep., 7 Ch. Ap., 802.

compensation. Here the misrepresentation was as to the fact that they, as directors, had power to authorize a general drawing of checks, and possessed the character and the right of directors vested with such a power. This misrepresentation brought it within the principle of *Richardson v. Williamson* (¹), where, because directors signed a certificate as to the deposit and repayment of a sum of money which their society had no legal power to borrow, they were held personally liable.

It is not to be supposed that courts will treat a mistake in point of law as something which may be committed under such circumstances without giving a right to compensation. In *Stone v. Godfrey* (²) it was expressly decided that the court will relieve against mistakes in point of law as well as mistakes in point of fact; and *Broughton v. Hutt* (³) is to the same effect. *Rashdall v. Ford* (⁴) was referred to by the Lord Justice Mellish in the court below (⁵) as establishing a different principle; but that case does not authorize the conclusions drawn from it. He supposed that in *Rashdall v. Ford* (⁴) there was a "direct representation," which did not exist here; but the words of a representation, even though in themselves indirect, may be such, and they are so here, as to produce on the mind of a third person the most direct effect. *If that effect is produced, the words [108 that produce it are in themselves of little consequence. The bankers are therefore entitled to recover from the directors the amount of the checks. Here, too, in the dealings with the bankers the shares were treated as paid-up shares, and they were accepted in the belief that that character really belonged to them. It was not so, and it is clear that the bankers are entitled to have the representation made good, or to be relieved from a liability which they had unconsciously undertaken on the faith of something that proved to be utterly incorrect.

Sir J. Karlake, Q.C., Mr. Fry, Q.C., and Mr. Speed, were for the respondents.

The LORD CHANCELLOR (at the end of the argument for the appellants) asked the respondent's counsel if they had any objection to urge against such an alteration in the decree as would relieve the bankers from any liability on the shares deposited with them and registered in their names. The alteration would be to this effect: "It is ordered that the defendants do join and concur in all acts necessary for can-

(¹) Law Rep., 6 Q. B., 276.

(²) 5 De G. M. & G., 76.

(³) 3 De G. & J., 501; 28 L. J. (Ch.), 167.

(⁴) Law Rep., 2 Eq., 750.

(⁵) Law Rep., 7 Ch. Ap., 802.

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celling the names of the plaintiffs Beattie and Barton in the register of shareholders of the railway company, and thereupon it is ordered that the plaintiffs' bill do stand dismissed out of this court with costs."

The respondents' counsel said they had no objection to this.

The LORD CHANCELLOR (Lord Cairns) then moved the judgment of the house:

My lords, this case, which in its progress has become enveloped in a large quantity of paper, in reality raises questions which are very small in themselves, and, as appears to me, very easily answered; although they involve, upon the one side and upon the other, a considerable sum in point of money.

My lords, the bill in the Court of Chancery below was filed by the public officers or trustees of the Union Bank of London against the Rickmansworth Railway Company and against its directors and its secretary. Putting aside that which was a very minor part of the case, the question whether the names of the plaintiffs should, as regards the future, be [109] removed from the list of shareholders of *the company, the real question which was in controversy in the suit was the question of the personal liability of the directors of the company to the plaintiffs. That personal liability was sought to be fixed upon the directors by two arguments; the first arising out of the manner in which the checks of the railway company upon its bankers, the Union Bank, were drawn; and the second arising out of a narrative connected with the handing over and transfer to the Union Bank and its officers of certain preference shares and debentures of the company.

Now, my lords, with regard to the first of these questions, the question of the liability in respect of the checks which had been signed by the directors, the equity which was alleged by the bill appears to have been of somewhat of an afterthought, and to have been inserted in the bill by amendment, for the only part of the bill that I can find referring to that question is to be found in a paragraph which from its numbering appears to have been inserted by amendment, namely No. 49a. It is this: "All the moneys which the bank advanced and paid were paid and advanced at the request of the defendants, the directors, and as they directed, and the bank honored and paid the checks of any two of the directors, countersigned by the secretary, by virtue of a written authority of the 4th of July, 1860, signed by three of them and assented to by all the others, and on the faith that

the company or its directors would repay the same and interest, and the plaintiffs submit that the defendants the directors are personally responsible for all such of the said moneys as they were not authorized to borrow or in respect of which they had no power to bind the company, with interest." The allegation is that the bank honored "the checks of any two of the directors, countersigned by the secretary, by virtue of a written authority of the 4th of July, 1860, signed by three of them, and assented to by all the others, and on the faith that the company or its directors would repay the same."

My lords, what was this authority, upon the faith of which it is said that these checks were paid? It is a very short letter addressed to the directors of the Union Bank of London or their manager at the Temple Bar branch: [His lordship read the letters, see *ante*, p. 103.]

My lords, so far as this authority is concerned, of course it *would only be a matter affecting the three directors [110 who signed it, Cary, Capel, and Warwick. But what does the authority amount to? At that time, there is no dispute, that the account of the railway company with the bankers had not been overdrawn. In point of fact the bankers had a balance in their hands belonging to the company. It appears to me that the letter is nothing more than a simple intimation of a most business-like kind transmitted to the bankers of the company, as to the manner in which they were to expect checks emanating from the company to be signed—an intimation to them that unless the checks were signed in this way, they were not to treat them as the properly authorized checks of the company, and were not to honor them. There is, in this document, no undertaking whatever on the part of any director of the company that he will be answerable for the debts of the company, or that if these checks are not paid by the company he himself will pay them. In point of fact, the account of the company with the bank at that time not being overdrawn, this authority, as I read it, is nothing more than a statement as to how checks were to be drawn upon that balance which was in existence at the bank. So far as this authority is concerned, it was not in any way a direction to the bank to honor checks after the whole of that balance had been withdrawn.

But then, my lords, the appellants at your lordships' bar go on from that and say, even supposing that this is not an authority during all time to honor checks, whether there was a balance or not at the bankers', still after the whole of the balance was exhausted, checks did in fact continue to be

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drawn upon the bank and to be honored by the bank, and for those checks the directors are personally liable, because, it is said, every check so drawn (that is, drawn after the balance was exhausted) must be taken to have been a representation of some kind, (it is difficult to say what), by the directors to the bank, by virtue of which they become personally liable. My lords, if checks are from time to time drawn on a bank on behalf of a railway company, the bankers are perfectly aware whether they have got in their hands a balance of the company, or whether they have not. If they have in their hands a balance of the company, it is their duty to honor the checks, provided only they are [11] drawn in the manner that has *been specified. If, on the other hand, they have not a balance in their hands belonging to the railway company, it is for them to consider whether they will run the risk of allowing the account to be overdrawn, and whether, if they do so, the law will allow them to recover as upon a loan, or as upon an advance of money, against the railway company. Those are matters which it is for the bankers, and for them alone, to consider, and I can see nothing in the fact that checks are drawn and signed by directors of a railway company, upon a bank, which knows its own affairs, and knows the state of the balances of its customers, that should in any way make those directors of the railway company personally liable.

My lords, we were referred by the learned counsel for the appellants to a case before the Privy Counsel which was said to be relevant to their argument upon this point; but I cannot find in that case anything whatever which supports the argument on behalf of the appellants. That case, namely, the case of *Cherry v. Bank of Australasia* (¹), was an extremely simple one. Two directors of a company in a colony, who were not a majority, and who, therefore, according to the company's act, had no right to bind it, transmitted to the bankers a letter, in which they stated that a particular person had been legally appointed manager of the company, and was authorized to draw checks. At the time when this letter was transmitted, in point of fact, the account of the company was overdrawn at the bankers', and the manager had not been legally appointed. It was a statement false in fact and erroneous in law, that he had authority to draw checks upon the bankers, or to bind the company. The court therefore proceeded, and, as I humbly venture to think, rightly proceeded, upon the well-known principle of law, that if a false statement is made, false to the knowledge

(¹) Law Rep., 3 Pr. Co., 24.

of the person making it, of a fact which is at the time practically ascertained one way or the other, and that statement is acted upon, and was meant to be acted upon, by others, the persons who acted upon and were misled by that false statement, have a remedy against the person who made it. My lords, that in no way applies to the present case. In the authority to honor checks dated the 4th of July, 1860, there is nothing which was in any way a misrepresentation or error. In the fact that *checks did from time to time continue to be drawn after the balance was exhausted, there was no misrepresentation, for the bankers knew all the facts. There was no error, because a check of that kind does not contain upon the face of it, or in reality, any assertion of any fact.

My lords, I pass, with those observations, from that part of the case, and I now come to the second head of equity—that connected with the preference shares and the debentures to which I have referred. It will be necessary that I should give your lordships a slightly prolonged narrative as to the way in which that question arises, and although the letters must to some extent be referred to, I think in one point of view it is satisfactory that the whole question rests, as it appears to me, upon the construction of those letters. Your lordships need not be embarrassed by any of the evidence in the case apart from the letters, for I cannot find that anything was said or done in the transactions between these different parties except that which has been put in writing in the correspondence to which I am going to refer.

I will ask your lordships to commence with a letter—a very important one, as it seems to me—of the 19th of December, 1862. At that time the Rickmansworth Company had stood upon its original act of Parliament; it had not at that time obtained an act, which it obtained in the year 1863, authorizing the issue of some preference shares and the borrowing on debentures of a certain additional sum of money. The letter of the 19th of December, 1862, is from the manager of the bank to the railway company, that is to say, to Lord Ebury, as one of the directors of the railway company. It is the second part of the letter to which I refer: “I have farther to request that the unissued shares”—that is, shares unissued under the first act, with which your lordships have now nothing to do—“be given to the bank as collateral security, and that your board will undertake to hand to the bank such preference shares and debentures as you may obtain authority to raise in next session of Parliament.”

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Now, my lords, what did this letter mean? I pray your lordships to observe, in the first place, that this is not the case of a railway company or of railway directors coming to a bank and offering a security which they describe in a [113] particular way. It is *the case of the manager of a bank describing for himself the security which he chooses to ask for; and I ask your lordships whether it is possible to read this letter of the manager of the bank as a letter which means that he expected to receive shares which should be paid up *aliunde*, paid up by the directors of the railway company, and should be assigned as paid-up shares, and that he should receive debentures upon which somebody else had advanced the whole amount of money, and which were to be assigned to the bank as debentures, carrying with them the evidence that money to the full amount had been already advanced to the railway company. Such an interpretation would be contrary to the plain and obvious meaning of the words. What the manager asks is this—that which is perfectly well known and not at all uncommon in matters of this kind—that the bank, which was largely under advance to the railway company, should become the *dominus* of the whole issue which was expected to be authorized by Parliament, whether of shares or of debentures. The words are: “I request that your board will undertake to hand to the bank such preference shares and debentures as you may obtain authority to raise.”

Well now, my lords, I turn to the answer to that request: “My directors,” says the secretary or an officer of the railway company, writing to the manager of the bank, “desire me to assure you that all unused, and all preference shares and debentures to be created by a bill about being introduced into Parliament, shall be handed to your bank in a sufficient amount to cover the balance now due upon the account of the company.” That was the request of the bank, and that was the undertaking of the company. Your lordships will find that letter of the 19th of December, 1862, referred to more than once afterwards.

I pass on now to another proceeding of the same kind. It appears that upon reflection, and upon consultation between the bankers and their solicitors, they were anxious to obtain a promise in a somewhat different form from the railway company; and Messrs. Benham and Tindall write thus to the officer of the railway company on the 23d of February, 1863: “Counsel has advised that we should require the chairman and directors to give their undertaking to use their best endeavors in their individual capacities to obtain

for the bank what your letter of the 19th of *December, [114 1862, promises. We have, therefore, to ask, if you see no objection to the form in which the undertaking is drawn," to have it stamped and to get it signed by the chairman and directors of the company. The draft of the proposed undertaking was inclosed. I will not read it all, but your lordships will see that it would, in effect, have bound the chairman and directors of the railway company to undertake personally, jointly, and severally to use their best endeavors "to cause to be handed to and deposited with, as security to the said bank, all the present unissued shares of the said company, and all preference shares and debentures to be created by a bill introduced into Parliament, intituled a bill to grant further powers to the Watford and Rickmansworth Railway Company, to a sufficient amount as, fully paid up, to cover the amount due upon such checks, with interest and commission thereon at the date of such deposit, and also with full power to the bank to realize such shares, debentures, and other securities at their free pleasure, and to apply the proceeds in liquidation," with a proviso that such security should not be realized below par without giving notice to the company.

Now, my lords, was that draft, which it appears to me would have varied materially the contract in the preceding letters, accepted, or agreed to, on behalf of the railway company? I took the liberty of asking the question of the counsel at the bar, and your lordships were referred to a passage in an answer of the directors. My lords, that passage seems to me to show that, in place of being accepted or agreed to, the draft was not accepted by the directors of the railway company. In the tenth paragraph of the answer, the directors, answering in another suit, said: "The said draft undertaking was never in fact signed by us, these defendants, the directors, or by any of us, but its form, as so altered, was never, to the best of our belief, objected to on behalf of the said Union Bank," and, no doubt they would not object to it, for it was their own document. "Notwithstanding this omission to sign the undertaking, it was always considered by us, these defendants, the directors, that we were bound on behalf of the said company, and in pursuance of the assurance given in the said letter of the said Mr. Jeyes, dated the 19th of December, 1862"—to do what?—"effectually to vest all the *unissued shares of the [115 company in the bank or its nominee;" that is, the shares under the first act of Parliament, which are now out of the case. There is, therefore, here no statement whatever that

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the draft was ever accepted or acted upon, or was taken by the railway company or its directors as binding upon them.

Then, let us pass on to another matter. It appears that on the 22d of January, 1864, the bank manager writes to the railway company. Your lordships will observe that we thus pass over the whole of the year 1863, and over the time during which the second act of Parliament was passed. That second act of Parliament having passed, the bank manager writes, on the 22d of January, 1864: "After several attempts, I gave the matter up for the time, and relying upon the promises of the board that the bank debt should be the first charge upon the preference shares and debentures about to be raised by a bill then in Parliament, I have been anxiously waiting some communication for months past in fulfilment of this promise." That must be the promise contained in the letter of the 19th of December, 1862, for no other had been given. In answer to that, the secretary of the company acknowledges the receipt of the letter on the 23d of January, and he says that he has at once communicated with the chairman and directors of the company. And after that (for some intervening letters are unimportant), the manager of the bank writes thus, on the 27th of February: "In reply to your favor of yesterday, I beg to inform you that I cannot pay the interest on the Watford and Rickmansworth Railway debentures, due the 1st of March, without I have the personal undertaking of the directors to the bank for the repayment of the same."

My lords, let us see what happened a little later on. After some intervening correspondence, in the course of which it is not unimportant to remember that the bankers did obtain the personal guarantee of the directors, confessedly such, for the payment of this interest, and we find that on the 8th of December, 1864, the manager of the bank writes this very important letter: "The delay in settling the large amount due to this bank causes my directors considerable uneasiness, and I have been instructed to apply to you" (that is, to the secretary of the railway company) "for a transfer of at least £20,000 of the unissued preference 116] "shares." Your lordships will observe that what he is applying for is not for £20,000 worth of paid-up shares, or of shares which had been taken by other persons, and been paid upon by those other persons, but for a transfer, which must of course mean a transfer to the bank, of £20,000 worth of unissued preference shares, upon which, of necessity, nothing had been paid, "into the joint names of myself and John Arthur Barton, Esq., of 2 Princes Street, Mansion

House, to be held by the bank as collateral security." Now, if this had been done, and done in this form, undoubtedly the officers of the bank would have taken these shares with all their liabilities. "And I am to request at the same time that your unissued debentures are to be transferred to the same names, you undertaking to do this when you are in a position to issue them."

My lords, I was certainly surprised to hear it said at the bar that Mr. Beattie was not aware of the manner in which the company could legally issue these debentures. What did Mr. Beattie mean when he spoke of the railway company being "in a position to issue" debentures which were authorized by the act, which authorized the issue of preference shares? There is only one circumstance which puts a railway company in a position to issue debentures, and that is having a certain amount of the share capital of the company, with reference to which those debentures are to be issued, subscribed for and paid up. It appears to me, my lords, that this is a letter which shows in the clearest way, that what the bank manager was asking for was an immediate handing over, or, as he calls it, a transfer, of all the preference shares, and he says that then he would be satisfied that, as those shares got out among the public and became paid upon, he should have the debentures also, when the company became in a position to issue them.

Then, my lords, you find the answer to that letter. I ought to remind your lordships that we were referred to a minute made by the railway directors, and which was made in consequence of the last letter which I have read; but I prefer not to take the minute, which is really the language of the company speaking to itself, but the letter which was written to the bank manager on the 20th of December, 1864. That letter runs thus: *—"Dear Sir,—I submitted your [117 letter of the 8th instant to the directors, and I am instructed to inform you that they will have no objection to carry out the arrangement you suggest, and have instructed me to allot the shares you name to Mr. Barton and yourself, to be held by you as collateral security for the debt owing to the bank." My lords, I submit here that it is impossible for persons engaged in business, and conversant with the way in which the affairs of banks are conducted, to allege, after receiving, without remonstrance, a letter of this kind, that they considered that they were not to be grantees of these shares, but to have these shares as shares upon which the persons to whom they were first given had paid up the whole of the capital.

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Your lordships will find that, afterwards, on the 3d of January, 1865, the formal resolutions for the issue of preference shares having been come to, the secretary writes to the bank manager in these terms: "I have now to acquaint you that the issue of the new preference shares having been finally sanctioned at the half-yearly meeting of the company held on the 23d ult., I am now prepared to place the shares and debentures named in your letter in your possession as collateral security to the bank for the debt owing, pending some more definite, and, I trust, speedy arrangement for the liquidation of that debt. I propose, as the course usually adopted in such cases, to register the shares, &c., in the names of two of the directors of the company, who will execute a transfer of them to you and Mr. Barton on a mutual understanding that they are to be held by you only as collateral security to the bank."

My lords, whatever form the shares may appear to be in, whatever form the debentures may appear to be in, the transaction upon this letter is perfectly manifest. The bankers were to have in their possession, pending realization of shares and of debentures, the whole of the shares and the whole of the debentures. It would be for the railway company, for its own benefit as well as for the benefit of the bank, to pass those shares as rapidly as they could into the market—to have them taken up and the capital paid as far as it could be paid upon them; but the bankers, having the shares, would be enabled to have the control over that operation, and to take care that any capital coming by [118] virtue of *those shares to the company should pass into their hands and be available for the liquidation of their debt. In like manner, also, the bankers would be able, when the proper amount of capital was subscribed for, and paid upon, in respect of the shares, to pass the debentures also into the market with the proper magisterial certificate of the payment of the necessary amount of capital. In this way they would have the control of the whole of the issue, and thus be able to prevent the railway company from passing the shares or the debentures into any other hands.

My lords, the manager does not repudiate that letter, but, on the 9th of January, he says: "In reply to your letters of the 3d and 9th instant, I beg to say I am quite prepared to accept the shares and debentures as collateral security pending your disposal of them." Then the whole narrative is ended by the secretary to the company writing to the manager on the 18th of January, "I have now the pleasure to forward you herewith the under-mentioned preference

shares, certificates, and mortgage deeds standing in the names of Lord Ebury and Mr. J. H. Dillon, two of our directors, accompanied by deed of transfer executed by the above gentlemen in favor of yourself and Mr. J. A. Barton ;" that being, in fact, all that was described by the manager of the bank as being the form in which these transactions were usually effected. But we have, as the origin and inception of the transaction, the original request of the bank, and the answer to and acceptance of that request, which explains clearly, at the beginning, what the character of the whole transaction was to be.

My lords, that really exhausts the whole of the second part of the case. It appears to me that there is no pretence for saying that there was on the part of these directors any misrepresentation with reference to these preference shares or these debentures. The manager of the bank knew what he had asked for, and it appears to me that he got exactly the thing which he asked for, and consequently that it is much too late for the bank now to allege, founding itself upon the form of the preference shares and the debentures, that that form amounted to a representation on the part of the directors of the railway company, that in point of fact these shares had been allotted really and *bona fide* to other persons, and paid upon by those other persons, and that these *debentures had actually been issued for money [119 or money's worth advanced by other persons to the company.

Now, my lords, I have to add to what I have already said one other observation ; I should be quite satisfied to rest the case where I have placed it, but after all, the whole equity alleged by these appellants is founded upon this—that there was some right which the bank expected to have, might have had, and ought to have had, of asserting against the railway directors its claim to the recovery of the debt which was due to the bank from the railway company. The equity is put thus, that the directors of the railway company have misled the plaintiffs into thinking that they had a personal liability of the railway directors, when, in point of fact, they had not a legal personal liability of the railway directors. But, my lords, is there any foundation for that allegation ? I find in the bill of the bank itself this statement, that the sum due from the company to the bank amounted in March, 1865, to upwards of £30,000, and frequent applications for its payment having been unavailing, the bank commenced an action in the Court of Common Pleas against the railway company for recovery of the sum owing and interest, and obtained judgment for £32,408 6s.

9*d.*—that of that amount the sum of £9,436 8*s.* 4*d.* was paid by some of the directors on behalf of the company in part satisfaction of the judgment debt—that £23,000 still remaining due to the bank, a writ of *elegit* was, on the 8th of January, 1866, issued out of the Court of Common Pleas against the railway company for the sum of £23,334 3*s.* 9*d.*, and on the same day lodged with the sheriff for execution. I cannot help pausing there for a moment for the purpose of observing to your lordships how very much better a position the bankers are in by virtue of their judgment than they would have been in upon the debentures, because the debentures were not payable until the 1st of March, 1870, whereas they asked for and obtained their judgment in the year 1866. The sheriff proceeded to execute it, and he took certain girders and chattels of a certain value—they are described as being of small value, but that is immaterial—£212 18*s.* 4*d.* arose from the sale of those girders and other chattels. It is then stated that a bill was filed against the company and the London and North Western Railway 120) Company for a *declaration that the bankers as *elegit* creditors were entitled to be paid the sum payable by the London and North Western Railway Company under their agreement for working the line. Therefore, my lords, the bankers appear to have asserted, and to have asserted successfully, their rights as creditors of the railway company—to have obtained judgment and an execution, and everything which could be obtained in that way, and how is it possible for them, my lords, in this proceeding, in the face of that statement, to allege that they have, by the conduct of the respondents here, been deprived of some right of action which they otherwise would have had against the railway directors if the conduct of the respondents had been different from what it has been?

My lords, it appears to me that the conclusion arrived at by the Lords Justices upon this case was, upon all the main points of the case, entirely correct, but inasmuch as in respect of these shares the officers of the bank have been placed as shareholders upon the register, and inasmuch as the decree of the Vice-Chancellor has declared that their names should be removed from the register (I assume upon the principle that they were to be there merely in respect of a contract for security of debt, and that there being no longer any question of realizing their debt by means of the transfer of shares, therefore their names should be taken off the register), and inasmuch as that decree has not been appealed against, it remains standing notwithstanding the

decree of the Lords Justices. It appears to me that a question may arise, and probably will arise, whether that decree can be made available by the bank, unless it is supplemented by a personal order against the officers of the railway company to do that which the decree declares ought to be done. My lords, I think that any alterations of the decree, made for the purpose of effecting this object, should not in any way affect the question of the costs of the suit under appeal, and what I suggest to your lordships to do is, to vary or alter the decree of the Lords Justices by declaring before you arrive at the words dismissing the bill, "that the defendants do join and concur in all acts necessary for cancelling the entry of the names of the plaintiffs Beattie and Barton in the register of shareholders of the said railway company, and thereupon it is ordered" (as the decree already runs) "that the bill be dismissed with costs;" and then *order upon this appeal, "that the decree be in [121 all other respects affirmed, and that the appellants pay the costs of this appeal." My lords, I humbly move your lordships that the order be altered in that form.

LORD CHELMSFORD: My lords, the case of the appellants in their printed reasons is based entirely upon the misrepresentation of the directors, both as to the overdrawn checks and as to the preference shares and debentures agreed to be given to the bank as security for the repayment of their advances.

It was argued on the part of the appellants, that as to the checks the written authority of the 4th of July, 1860, amounted to a representation that the company had given the respondents, the directors, authority to bind them, by drawing checks upon the bank, but not of overdrawing their account, and that each check drawn by the directors when the company had no funds in the bank, was a misrepresentation which rendered the directors personally liable for the amount. It appears to me, that the effect of that authority is entirely misconceived—it is in these terms: [His lordship read it, see *ante*, p. 103.] This is only the ordinary form of a notice. When a company is about to open an account with a bank it is necessary that the bankers should be informed by whom, and in what manner, the checks to be honored are to be signed. What does this authority do more than that? It is not limited to the honoring of checks drawn within the funds belonging to the company, but applies to checks generally. What room is there for the argument that when the account is overdrawn by a check, there is a misrepresentation?

No check can be drawn without an order in each particular case. It is said that the order is the order, not of the company but of the directors; but the directors have the management of the pecuniary and other affairs of the company, and are not restricted from incurring debts for the purpose of the company, by overdrawing the account. In this case, the bank could have protected itself by refusing to honor the checks. It is said that the authority to draw gave the directors no power to overdraw the account. But if the directors had no authority to draw the checks, they [122] were *not the checks of the company, and this must have been known to the bankers. There was, therefore, no authority to pay them, and they paid them in their own wrong as the checks of the company. It is a strong circumstance, which was admitted on the part of the counsel for the appellants, that there is no case to be found in the books where directors have been made personally responsible for overdrawing an account of a company with their bank.

The argument at one time took the direction that the authority to honor checks amounted to an undertaking on the part of the directors that for any of the debt incurred by the drawing they would be personally responsible. But independently of the document itself not bearing that construction, the appellants could hardly have thought it could have that effect, for upon three occasions when they made advances to the company to the extent of upwards of £7,000, they required and obtained the guarantee of some of the directors. All the moneys advanced upon the checks of the directors are admitted to have been applied to the purposes of the company. The bankers in their bill state this: "The said Union Bank of London were duly appointed and became the bankers of the company, and at their request the directors paid various sums of money to, and on behalf of, the company and for the purposes of the company, and all such moneys were applied for such purposes accordingly, and the said directors and the company having, in the month of December, 1862, become largely indebted to the said bankers, the plaintiff John Beattie, as the manager of the Temple Bar branch of the said bank, required payment of the amount due." And then, in March, 1865, the bankers sued the company and the directors to recover the amount of their advances. The directors who had guaranteed advances paid the amount of those guarantees, and the bankers recovered judgment against the company for the money paid upon the checks, upon which they issued an

elegit and obtained a small sum, but it was all that the company's chattels would realize. Upon these facts, my lords, I do not see how it is possible that the directors can be made personally liable for the money advanced upon checks at the time when the account of the company was overdrawn.

The second head of claim, founded, like the former, upon alleged misrepresentation, is, with respect to the preference shares and *debentures, transferred to the bankers as [123 security for their advances and payments. As to these, it is alleged that the directors of the railway company represented them as validly issued shares and debentures, and that not being so, they are bound to the bank, either to make good the representations, or personally to indemnify the bank against the consequences arising from them. As to this part of the case the whole of the alleged misrepresentation is and must be founded upon the correspondence between the parties. The first letter which opened the negotiation is of course of very great importance, but, as my noble and learned friend on the woolsack has observed, it was not an offer on the part of the company to give security to the bankers for the moneys they were to advance, but it was a request of the bankers themselves to have security, and the security which was required was stated thus: "I have farther to request that the unissued shares be given to the bank as collateral security, and that your board will undertake to hand to the bank such preference shares and debentures as you may obtain the authority to raise in next session of Parliament." What they stipulated for as to the preference shares and debentures was merely that when issued they should be handed over. It appears to me that the meaning of this request, and all that the bankers require, is that the preference shares and debentures should be placed with them, so as to give them the control over those shares, and enable them to issue those preference shares and debentures and receive the money upon them.

Some stress was laid upon a proposed undertaking, which, upon the advice of counsel, the solicitor of the bank proposed to the company's solicitor. Now, this undertaking was never signed nor ever expressly agreed to, but it is said that the directors impliedly agreed to it, and their answer is referred to. It appears in the printed papers as an exhibit to an affidavit of Beattie. What they say is this: "The said draft undertaking was never, in fact, signed by us, these defendants, the directors, or by any of us, but its

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form, as so altered, was never, to the best of our belief, objected to on behalf of the said Union Bank. Notwithstanding this omission to sign the undertaking, it was always considered by us, these defendants, the directors, that we were bound on behalf of the said company, and in pursu- [24] ance of the assurance given in the said *letter of the said Mr. Jeyes, dated the 19th of December, 1862," to do what? "effectually to vest all the unissued shares of the company in the bank or its nominee" exactly in accordance with the terms of the letter of the 19th of December, 1862? That was all that the bank required, and that was all that the railway company agreed to do. Of course this leaves the question to rest entirely upon the terms of that letter of the 19th of December.

The letter of Beattie asking for the transfer of preference shares and debentures when issued is perfectly consistent with the respondents' understanding of that letter as it appears from their answer. Beattie writes on the 8th of December: "The delay in settling the large amount due to this bank causes my directors considerable uneasiness, and I have been directed to apply to you for a transfer of at least £20,000 of the unissued preference shares into the joint names of myself and of John Arthur Barton, Esquire, to be held for the bank as collateral security, and I am to request at the same time that your unissued debentures are to be transferred to the same names, you undertaking to do this when you are in a position to issue them." Sometime afterwards (on the 3d of January, 1865), Mr. Forbes, the secretary of the company, writes to Mr. Beattie, the manager of the bank: "I am now prepared to place the shares and debentures named in your letter in your possession as collateral security to the bank for the debt owing, pending some more definite, and, I trust, speedy arrangement for the liquidation of that debt. I propose, as the course usually adopted in such cases, to register the shares, &c., in the names of the two directors of the company, who will execute a transfer of them to you and Mr. Barton, on a mutual understanding that they are to be held by you only as collateral security to the bank." And then a letter is written by Forbes to Beattie, saying: "The shares and debentures are at your disposal, and I shall be glad to conclude the arrangement." Beattie writes on the 9th of January: "In reply to your letters of the 3d and 9th inst., I beg to say that I am quite prepared to accept the shares and debentures as collateral security pending your disposal of them."

Now, my lords, what is there through the whole of the documents and correspondence to show that it was ever agreed that *the bankers were to have paid-up shares [125 and debentures, or what is there to show that they have any evidence on which to convict the directors of any misrepresentation? It is said that the directors, when they handed over the debentures, knew that they were not valid because they had no magisterial certificate, which, under the special act, could not be obtained until the shares were subscribed and paid upon: but Mr. Beattie must have known as well as the directors that the shares were not subscribed and paid upon, and therefore that no debentures could legally be issued. The preference shares had been transferred into the names of Beattie and Barton, and the debentures were transferred to the same names, as requested in the letter of the 8th of December, 1864.

My lords, it appears to me that the bankers have got all the security they are entitled to. I think that the decree of the Lords Justices ought to be affirmed, and I entirely agree in the motion which has been made by my noble and learned friend.

LORD HATHERLEY: My lords, I am also of the same opinion. It appears to me to be quite clear, on a careful perusal of the correspondence between the parties to this case, from which alone we can derive information, there being no trustworthy evidence of any parol communications on the subject, that the bankers knew perfectly well the course that matters were taking as between them and this company with respect to the advances from time to time made by the bank. The appellants, in the very inception of the matter, took care—wisely and prudently, no doubt, on their part—when the account from time to time was in a position which they thought required it, to exact a personal guarantee from the directors of the company. The very circumstance of their so doing would in itself strongly tend to lead one to the conclusion, were there any doubt upon the face of the correspondence, that the true interpretation would be that, where the security was intended to be of that personal character, it was asked for, and, as we have seen, it was given.

Now, my lords, with regard to the very inception of this whole matter, this is the most singular case I have ever known brought *before a court of equity, particularly [126 looking to the manner in which the whole of this large claim has been launched by means of one of the commonest and most ordinary documents by which a company, or person

who does not, or cannot, from his circumstances, draw checks upon his own account, informs his bankers by whom those checks will be drawn and whose checks they are to honor. The company in this case cannot put its corporate seal to all the checks that may be required to be drawn upon the bankers. The respondents had to inform the bank in what way the checks upon a certain amount of money standing in the bankers' hands (which was the case at the time when this transaction took place) were to be drawn. For that purpose they wrote this letter: [His lordship read it.] It has been attempted upon that to say that there is here a warrant that whenever any check of the company is signed by two directors and countersigned by the secretary, be there assets or be there not at the bank which ought to answer that check, the bank is authorized by this letter to infer a guarantee on the part of these persons giving this authority that the overdrawn drafts shall at all times be satisfied and guaranteed by the directors.

It is certainly a very startling proposition, and one answer only could be given to the question which was asked by my noble and learned friend on the woolsack—whether any instance is to be found in the books (and we have had all the authorities which could possibly have any bearing upon the subject brought before us) of persons being made liable for an overdraft made by the directors of a company, upon the ground of their having informed bankers in what form the checks were to be drawn by the directors of the company, or upon the other ground which was alleged here, namely, that the persons drawing the checks by that mere fact intimated to the bank that they had assets in their hands sufficient to answer all those drafts on the bank, although there were no such assets in the hands of the bank upon which such checks were drawn. The answer was in the negative. I should have been very much surprised if such a case could have been found. The cases, I am sorry to say, are innumerable, of companies in difficulties, and the cases have also been very frequent of companies in difficulties [27] with very wealthy directors, and yet *it never has been attempted in any case (far less successfully attempted) to fix the directors with a representation that there were assets of the company sufficient to answer the checks, merely because the checks had been drawn and the bank had taken upon itself to answer them.

Just observe, my lords, the caution of the bankers at the commencement of these proceedings (unhappily for themselves they were not equally cautious afterwards), soon after

the account was opened and the direction to honor checks given. That being on the 4th of July, 1860, in the very next document, in the letter written on the 12th of March, 1861, the bankers ask that the directors personally shall guarantee to them a sum of £6,000, which is to be carried to the credit of the banking account of the company, and which will, of course, then be naturally drawn upon by checks signed as they were in the first instance authorized to be signed. That document runs thus: "To the Directors of the Union Bank, London, Temple Bar: Gentlemen,—In consideration of your advancing the sum of £6,000 to the Watford and Rickmansworth Railway Company, in anticipation of calls and funds, we hereby undertake that the said sum of £6,000 shall be repaid you within six months from the date of the advance from the calls due on shares of the company. The interest on the said advance to be charged at the rate of 1 per cent. above the minimum rate for the time being of the Bank of England." That is signed by the chairman and three of the directors, and it might well be said to be an undertaking and guarantee on their part.

My lords, farther than that we find that when the bankers, after allowing the account of the company to be largely overdrawn, are called upon to make farther payments, they declined to make those payments upon the drafts of the three directors, and asked to have a separate guarantee from individual directors that they will pay if the company should not. That the bankers, therefore, perfectly understood their position is quite apparent; and as to any deception being practised upon them by the directors in this case by means of the representations made, as it is alleged, as to the assets of the company, we find in one case that even for such a small sum as £130, and for a still smaller sum, I think, in another case, they required a personal guarantee from the directors before *they would make any payment, knowing full well that they had no such guarantee to stand upon without a fresh undertaking, and not dreaming at that time of setting up this common and ordinary instrument, merely informing them how checks would be drawn, as such a guarantee.

I apprehend, my lords, that that part of the case of the bank as to the overdrawn entirely fails; because if you ask who had notice and who had not, of the state of things in which these checks were drawn, the answer can only be one. The bankers knew perfectly well when the account of the company was overdrawn, and it was in their breast at any time and every time when the checks came, not to honor

them. They were not bound to honor checks on an overdrawn account. The directors individually would be placed certainly in a very fearful position if it was to be held that each time they signed a check they were supposed to import into that signature of the check, drawn by them as they conceived by virtue of their office, an undertaking that there would be funds at the disposal of the company to meet the check whenever the bank chose to pay it. The directors individually were very far from having a knowledge of the exact state of the assets of the company, and they in such a case would necessarily have had to investigate the state of those assets upon each occasion of a check being drawn. The bankers, on the other hand, were perfectly well able to protect themselves, not being bound to pay a single check when the account was overdrawn without taking guarantees, which, in numerous instances that are to be found in these papers, they did take.

Now, my lords, as to the other part of the transaction, I think, after what has been said, it is scarcely necessary for me to dwell at any length upon it. I will, however, just mention the view I take of it. It seems to me that from the very first the application made by the bankers was to have the control of the preference shares, which, by the new act of 1863, the directors were authorized to issue, and to have the control of the debentures which, when a certain amount of the preference shares had been paid up, and a magistrate's certificate had been obtained, the directors were also to have the power to issue; and to have that control by means in the first instance, as they ask, of an allotment, for they ask [29] to *have a transfer made to the two officers of the bank, the answer to which is: we will "allot" you (as you express it) shares as you ask for them. They afterwards feel some difficulty, and, perhaps, some danger, in taking that mode of procedure; and then they have some farther communication with the secretary of the company; and then the secretary says, Well, we will take the course which is usual in these cases, we will transfer the shares first into the names of two of our directors (evidently meaning any two, and not Lord Ebury and Mr. Dillon individually), because we owe the money, and we will pay by that course of procedure. He says: We will take the usual course in such cases of transferring into the names of any two of our directors whom it may happen to be convenient to transfer to; and then they, having had that transfer, shall transfer again to you. It was impossible for the bankers to suppose that that meant that they were to have shares completely and actually paid

up, when in the first place they had asked simply for an allotment; and, secondly, they accepted this mode of proceeding, which is represented to be the common and ordinary mode of procedure, as putting the thing in the right form, the bank being perfectly aware how and why that form had been adopted.

Then, my lords, as regards the debentures, they had in like manner, in a previous letter (which was commented upon by my noble and learned friend on the woolsack), in the origination of this matter said: You shall give us these preference shares and debentures "whenever you are in a position to issue them," perfectly well knowing what the conditions upon which they could be issued were, knowing that the debentures were not issuable at once, but that they were issuable from time to time as the shares became subscribed for and paid upon. The preference shares would be issued from time to time, as occasion might serve; and the debentures could only be issued in compliance with the act of Parliament, which it is impossible to suppose from the correspondence (or even without it) that Mr. Beattie, the manager of the bank, was ignorant of. The bankers have got, as it appears to me, all that they supposed they had,—I cannot find a single fact that was concealed or was misrepresented to them. As was pointed out to us by counsel, they would see an apparent transfer to Lord Ebury and Mr. Dillon, which was not to be the ultimate state of *the [130 transaction, but as to that, they were informed that it was to be done in the usual way, as it was called. They had debentures which expressed money to have been paid by some parties on the face of them, but which they perfectly well knew could not have been issued with the magistrates' certificate up to that time, inasmuch as those preference shares, or a large proportion of them, were held by themselves, and they perfectly well knew that they were not paid upon, and had not been paid upon. That being so, the transaction appears to me to have been as completely known to the one side as to the other throughout the whole of this business.

My lords, the authorities which were cited (I am not going to pursue them in any detail, because one observation applies to each and all) come to this—that if a man misrepresents a fact, to that fact he is bound, if any other person, misled by such misrepresentation, acts upon it and thereby suffers damage. That is a principle of law long settled, and all the authorities turn upon that point. The only question your lordships have to ask yourselves is, has there been any such misrepresentation of fact in this case. There does

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not seem to me to have been anything of that kind. This case is not to be compared to the case of a person who is represented to be the manager when he is no manager, and whose actions had been trusted to as manager when he was not really such. Nor is it to be compared to a case where persons represent themselves as authorized to borrow money for a building society when they have no such authority at all; or where persons represent themselves as authorized to borrow money as the trustees of a road, or for some purpose of that kind, when they have no such authority. Those who choose to make representations of that kind must stand by the representations they have made; but misrepresentation does not exist when each party is perfectly cognizant of the true state of affairs, as in this case.

I entirely concur, therefore, in the motion which has been made by my noble and learned friend.

LORD O'HAGAN: My lords, I am of the same opinion. After the full statements of their reasons which have been given by the noble and learned lords who have preceded me, [31] I shall not say anything *except to indicate very shortly the grounds upon which I take this view of the matter.

It appears to me that the decision of the Lords Justices is entirely according, not only to the equity of the case, but to the precise rights of the parties as ascertained under their own hands in the correspondence. It appears to me that the judgment, which this House I hope will affirm, gives to the appellants all that they ever bargained for. I cannot find from the beginning to the end of this case any mistake on the one side, or any misrepresentation on the other. I believe that there was no misrepresentation and no mistake. I think that fact distinguishes this case from all the cases which have been cited to us; and certainly from the case of *Cherry v. Bank of Australasia* (1) and the two other cases upon which the learned Vice-Chancellor founded his judgment. In this particular case I cannot conceive, when the document of the 4th of July, 1860, is looked at, that there is any pretence for saying there was any misrepresentation. It may be said that impliedly that document does make several representations. It represents the existence of a railway company; it represents that the persons who sign it are directors of that company; and it represents that those persons intend to issue checks. It represents nothing more; and those representations are all precisely according to the facts.

Then, my lords, when you come to the checks, it does

(1) Law Rep., 3 Pr. Co., 24.

not appear to me that they carry the case at all farther. The checks make no representation, and show no undertaking at all. There is no undertaking that there shall be funds to answer those checks. When we remember that the bankers throughout the whole of these transactions were as cognizant of the monetary condition of the railway company as the company itself, that they knew whether or no they had money to answer the checks drawn upon them, I should say that they acted at their own peril, and made these advances without the undertaking which they might have got, and which, in particular instances, they did get, from the directors individually. Under these circumstances they must take the consequences and suffer the results. So much as regards the first part of the case.

*Then, my lords, as to the shares and debentures, [132 it is not necessary for me to go into any details of the correspondence—it has been borne into my mind as the clear conclusion from the whole of it, that the bankers accepted those shares and debentures not as paid-up shares at all, not as debentures upon which money had been paid, but only as securities which they might hold against the current advances, and which they might at any time put into circulation in the market, and so get as much as would, upon the fully paid-up shares, answer all their demands and secure them from any liability. It appears to me that that is the effect of the whole correspondence; and looking at the whole of the correspondence, I am of opinion that the demand is, in fact, a mere afterthought. It appears to me to be perfectly plain that when the appellants originally asked for the shares and debentures they did not mean paid-up shares or debentures upon which money had been paid. Take the letters between Mr. Beattie and Mr. Jeyes—you find Mr. Beattie in the first of his letters demanding what? Not fully paid-up shares at all, but unissued shares and debentures which thereafter might be brought into effect, plainly showing that there was no contemplation in his mind at that time of shares which were paid up, or debentures which at that time were valuable. And we find Mr. Jeyes answering in exactly the same way. He says: We will comply with your demand as to the unissued shares and as to the debentures which are hereafter to be issued. When they come to enter into, or prepare, that unexecuted undertaking, to which reference has been made by one or two of my noble learned friends, you find on the face of that undertaking that the undertaking is not to give paid-up shares, and not to be answerable as for paid-up shares, but

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the undertaking is simply that these directors will do their best to get the unissued shares handed over according to the contract. That is the whole of it. The words "paid-up shares" are used in that undertaking no doubt, the unexecuted undertaking, as I call it; but those words, where they are used, manifestly point to this, that the bank is to have the unissued shares and the debentures for the purpose of using them in such a way that, when enough has been got upon them as upon fully paid-up shares, the whole transaction between the parties will be settled absolutely.

[133] *Therefore, my lords, upon the whole of this case it appears to me to be perfectly plain that the bank is getting all that the bank ever contracted for. It only asked for unissued shares, and not for paid-up shares. It never asked for a general undertaking from the directors. Whenever it felt itself pressed with danger and difficulty, it did demand an undertaking, and when it did not, it must take the consequences. Upon these grounds, therefore, I am clearly of opinion that the judgment of the Lords Justices ought to be affirmed with the modification which has been suggested by my noble and learned friend on the woolsack.

Mr. *Swanston*: Before the question is put to the House, will your lordships allow me to make two slight observations upon the form of the order. One is, that your lordships propose to direct that the appellants are to pay the costs. Would your lordships think it right to direct that that should only be done after the names have been removed? We anticipate great difficulty in getting that done. The second observation I have to make is this. The respondents have thought fit to print a separate appendix containing the amended bill which had been already printed in the joint appendix. I ask your lordships to exclude that from the costs which your lordships are about to direct the appellants to pay.

The LORD CHANCELLOR: My lords, it is not the habit of your lordships' house to hear applications upon the subject of costs after a case has been decided. With regard to the first application of the learned counsel, it appears to me that it is quite unnecessary to delay the payment of the costs of the appeal until after the names have been taken off the register. The bill is not to be dismissed below until that has been done.

Decree appealed against affirmed, with variations; and appellants to pay the costs of the appeal.

The following order was afterwards entered on the Journals:

It is *Ordered* and *Adjudged*, by the Lords Spiritual and Temporal, in Parliament assembled, that *the said decree or order [134 of the Lords Justices of Court of Appeal in Chancery, of the 20th of July, 1872, complained of in the said appeal, be varied as follows, namely, by inserting after the words "And it is ordered," and before the words "that the plaintiffs' bill do stand dismissed," the following words, namely, "that the defendants do join and concur in all acts necessary for cancelling the entry of the names of the plaintiffs John Beattie and John Arthur Barton in the register of shareholders of the said railway company, and thereupon it is ordered": And it is farther *Ordered* and *Adjudged*, that the said decree or order, subject to the above-mentioned variation, be, and the same is, hereby affirmed: And it is farther *Ordered*, that the appellants do pay or cause to be paid to the said respondents who have answered the said appeal the costs incurred by them in respect of the said appeal, the amount thereof to be certified by the clerk of the Parliaments: And it is also farther *Ordered*, that the cause be remitted back to the Court of Chancery to do therein as shall be just, and consistent with this variation and judgment.

Lords' Journal, 19th May, 1874.

Solicitor for the appellants: *Alexander Dobie*.

Solicitors for the respondents: *Baxters & Co*.

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[Law Reports, 7 House of Lords, 135.]

June 11, 12, 15, 1874.

135] *THE AGRA BANK, LIMITED, AND THE AGRA AND MASTERMAN'S BANK, LIMITED, Appellants; and MARY TERESA BARRY, AND ROBERT HENRY HALY, Respondents.

Mortgage, Equitable and Legal—Priority—Registration Act (Ireland)—Client affected by Solicitor's Knowledge.

The non-production, in Ireland, of title deeds to the solicitor instructed to prepare a mortgage upon an estate there, will not of itself be deemed a proof that the solicitor has acted fraudulently, or even negligently, so as to affect the interests of his client. The construction to be put upon his conduct does not depend on an inflexible rule of law, but upon the circumstances of the case.

Where, therefore, the owner of an estate in Ireland had already created an equitable mortgage upon it by depositing the title deeds with a creditor, (which equitable mortgage was not registered); and, afterwards, on being asked for them by a solicitor who was about to prepare, for another creditor, a legal mortgage of the same estate, gave an excuse for their non-production, which, under the circumstances, appeared quite satisfactory, and also supplied in his own handwriting a summary statement of their contents; and the solicitor, in total ignorance of the equitable mortgage, and of all that had been previously done, prepared the legal mortgage, which was duly registered:

Held, that the legal mortgage had priority over the equitable mortgage, and was not assailable on the ground that the solicitor had improperly acted in preparing it without insisting on the production of the deeds:

Per LORD SELBORNE: It is inconsistent with the policy of the Irish Registration Law to impose on a mortgagee, or purchaser, the duty of inquiry with a view to the discovery of previous unregistered interests, but quite consistent with it, if he knows of the existence of those interests, to estop him from contending that, as to him, they are void merely because they are unregistered.

The doctrine of imputing in all cases the knowledge possessed by the solicitor to the client who employs him, considered.

Wormald v. Mailand (1) questioned.

Observations on the form of a decree for taking the accounts in such a case.

In the year 1847, Mary Teresa Haly (widow) was married to Alexander Mackay, who, in the year 1850, became the proprietor of a business in the jute trade at Serajgunge, in [36] Bengal. In 1851, *George Richard Barry was admitted as his partner in this business. Each partner was, under the articles of partnership, to be entitled to draw out of the concern for his own use a sum of Rs.400 (£40) per month. Mackay died at Dacca on the 14th of September, 1856, and by his will dated the 15th of August, 1856, he left everything to his wife and children, and made her his sole executrix. He left by her two children, Alexander James and Mary Georgina, both of whom are still minors. His property consisted of a policy on his life for Rs.25,000 (£2,500),

(1) 35 L. J. (Ch.), 69.

his share in the Serajgunge concern, and some other matters not of considerable amount. The amount of the policy was received by the executrix, and invested in government securities. The profits of the business of Mackay, Barry & Co. amounted, up to Mackay's death, to above Rs.206,963, equal, for the share of Mackay, to £10,348 3s. 6d. Mrs. Mackay did not draw this sum out of the concern, but permitted it to remain there for the benefit of the business, Barry undertaking to pay the usual Indian rate of interest, 10 per cent., for the same. In the year 1857, Mrs. Mackay married George Richard Barry, and advanced to him the Rs.25,000, the policy money, on his undertaking to give her, as executrix of Mackay, security for the same. This money was not all lent at once, but at intervals, and she, pressing for security on account of her children, obtained from him on the 28th of February, 1861, a bond, given to her in her character of executrix of Alexander Mackay, in the penal sum of Rs.50,000, to secure the payment on the 3d of December, 1863, of Rs.25,000, with any farther advances, and 10 per cent. interest, with annual rests. As a farther security, he executed a mortgage, of even date, of his interest in certain tea estates in Assam. The jute concern was in 1864 sold by Barry to a limited company for £28,000, but no part of the purchase-money was handed over to the executrix of Mackay's estate. Mrs. Barry became in 1866 much alarmed at the state of money matters in India and in England, and pressed her husband for security for her children. He was at that moment in apparently prosperous circumstances, was a member of Parliament for the county of Cork, and was known to be engaged in the purchase of estates in Ireland. He consented to give the required security, and the solicitor employed to prepare it was Mr. William Henry Daniel *Oehme, who had not before been employed by [137 Mr. or Mrs. Barry, but who had practised in India, and was acquainted with Indian as well as English business. Mr. Barry gave him instructions to prepare the deed of mortgage, which was to be given upon Barry's Irish property. This property consisted of certain estates at Gortnaclough and Crinallow, and also of Dunbollog, the purchase of which last-named property was not, at that time, completed. Mr. Oehme, with a view of preparing the deed, asked Barry for the conveyances; he received the draft conveyance of Dunbollog, but, on asking for the conveyances of the Gortnaclough and Crinallow properties, he was told that they were at Mr. Barry's residence at Lota, in the county of Cork, but particulars of them were promised to be furnished, and

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those particulars were furnished in writing by Barry himself. Mr. Robert Henry Haly (Mrs. Barry's son by her first marriage), who had previously managed the business in India, consented to be the trustee under the deed, which was executed on the 5th of October, 1866. This deed conveyed the Gortnaclough and Crinallow property, and also the Dunbollog property (the purchase of which last-named property had been completed on the 11th of June, 1866) to Haly in trust for Mrs. Barry, or other the legal personal representative of Alexander Mackay, with a proviso for redemption on payment of £31,641 12s. 6d. (that sum being taken as the gross amount of Barry's indebtedness to Mackay's estate) on the 1st of January, 1872, with interest at 5 per cent. This deed was registered on the 12th of October, 1866. At that time Barry was, in fact, considerably indebted to the Agra Bank (Limited), especially for a loan of £25,000 advanced by the Agra & Masterman's Bank (now the Agra Bank) in June, 1860, and had written certain letters to the bankers, dated the 27th and the 29th of June, 1865 ('), and the 7th [38] and the 13th *of April, 1866, which they insisted constituted an equitable mortgage of his Irish property in their favor. The deeds of the Gortnaclough and the Crinallow property had been, in fact, deposited with the bankers, instead of being at Barry's house at Lota, but no deposit of the deeds of the Dunbollog property had been made.

On the 1st of February, 1867, the appellants filed a cause petition (which was afterwards amended) praying for specific performance of the agreement by way of equitable charge contained in the aforesaid letters. The original bill was

(¹) The important part of that letter, which formed the foundation of the banker's claim, was as follows:

"With reference to the conversation I had with you this morning on the subject of my receiving a loan from the bank of £25,000 for six months, I beg to state that, in security for same, I shall be prepared to lodge with you the joint promissory note of Mr. W. Thompson and myself for the above amount, with debenture bonds in my favor for £30,000, due on the 1st of January, 1867, as collateral security, or, if the bank would prefer it, would lodge the title deeds of the property in Ireland, which I am now purchasing, to the above value. You will oblige me by placing my application before your directors to-day, and hoping that they will accede to my proposal,

"I am, &c.,

"G. R. Barry."

The bank directors did agree to the proposal, advanced the money, and received the deeds relating to Gortnaclough and Crinallow. The transaction as to the Dunbollog estate was not then completed, and the deeds relating to that property were never deposited, though Mr. Barry, on the 29th of June wrote to say he would lodge them "when the purchase of the Dunbollog property is completed." There were thus memoranda accompanying the deposit of the title deeds. As to the propriety of registering (under a similar act, the Irish Bankers Act), in a case where such memoranda existed, see *Copland v. Davis* (Law Rep., 5 H. L., 358).

drawn against Barry himself, but he died on the day before it was put on the file, and it was afterwards amended by making Mrs. Barry and Mr. Haly parties thereto. The amended bill filed on the 25th of May, 1868, charged that the granting of the mortgage to Mrs. Barry was fraudulent, that it was granted without consideration, that no inquiry was made for the title deeds of Gortnacloagh and Crinallow, and that the neglect to make such inquiry was itself a legal fraud sufficient to deprive the defendants of any priority by reason of the registration of their mortgage, and that they must be taken to have had notice—constructive notice, at least—through Oehme, of the previous equitable mortgage to the bank.

The defendants, in their answer, denied all knowledge of the loan of £25,000 to Barry, or of any security given for it.

The cause was heard before the Master of the Rolls, who declared the deed of the 5th of October, 1866, to be fraudulent and void as against the bankers. Mrs. Barry appealed against that decision, contending that the cause petition ought to have been dismissed with costs, so far as it sought to obtain priority for the demand of the bank over the mortgage of the 5th of October, *1866, to the extent of any [139 moneys thereby secured which were at the date thereof due upon the bond and mortgage of the 1st of March, 1861. The Lord Chancellor (Lord O'Hagan) and the Lord Justice of Appeal Christian expressed their opinion that the decree of the Master of the Rolls must be varied ('), for that giving priority to the first equitable mortgage, though unregistered, over the second legal mortgage, which was registered, it could not be sustained, there being no evidence whatever to show that the grantees in the mortgage deed had been guilty of any fraud or had had notice, actual or constructive, of the equitable mortgage.

This was an appeal against that decision.

Mr. Fry, Q.C., and Mr. Gerald Fitzgibbon, Q.C. (of the Irish Bar), (Mr. Westlake, Q.C., was with them), for the appellants: The real claim of the respondents here rests alone on the fact of registration. But it has long since been decided that registration of a deed, with notice of a prior deed unregistered, shall not prevail against it: *Blades v. Blades* (*). The object of the statute was to prevent frauds: *Forbes v. Deniston* (*). No one can doubt that the solicitor who prepared the deed was, at the least, utterly careless to inform himself of the facts, and avoided making any inquiry

(*) Ir. Rep., 6 Eq., 128.

(*) 1 Eq. Cas. Abr., 358.

(*) 4 Bro. P. C. (8vo. ed.), 189.

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which might be inconvenient to his clients. He must, therefore, be taken in equity to have been cognizant of those facts, or at least to have the full opportunity of being cognizant of them, and, being so, his knowledge affects his clients, with notice; for in all the cases a determination not to inquire, a wilfulness in evading the duty to inquire, has always been treated as equivalent to actual notice. Vice-Chancellor Turner so expressly declared in *Hewitt v. Loosemore* ⁽¹⁾, although he did not apply the rule in that case, because he did not think that the evidence there had made out that there was any evasion of inquiry. That case was cited and considered in *Wormald v. Maitland* ⁽²⁾, and there it was held that constructive notice of a prior unregistered incumbrance affecting lands in Middlesex is as effective as actual notice, and an equitable mortgage of a prior date, [140] though *unregistered, was held to have priority over even a registered marriage settlement. In *re Allen's Estate* ⁽³⁾ is to the same effect. In *Sheldon v. Cox* ⁽⁴⁾ notice of an unregistered mortgage was held to affect subsequent mortgagees who had registered, and the fact that the agent of the subsequent mortgagees was himself the owner, was declared to make no difference in the matter. *Boursot v. Savage* ⁽⁵⁾ was to the same effect. There A., being one of three trustees, executed an assignment of the trust property. A. was also a solicitor, and subsequently effected a sale of the same property, in which sale he acted as solicitor for the purchasers, and they were held to be, through him, affected with notice of the previous assignment. *Hine v. Dodd* ⁽⁶⁾ does not affect this case, nor *Jolland v. Stainbridge* ⁽⁷⁾, nor *Wyatt v. Barwell* ⁽⁸⁾, nor *Chadwick v. Turner* ⁽⁹⁾, for they really all depended on what amounted in each to notice, and they declared nothing more than this, that where you allege fraud you must make it out clearly by proof. Then comes the question, what is the general rule in such cases as the present, whether actual notice is required, or whether constructive notice is not enough. It is submitted that constructive notice is enough. In *Le Neve v. Le Neve* ⁽¹⁰⁾, constructive notice, that is, notice through the agent of the defendant, was held to be notice to the defendant himself, and that was a case which related to marriage articles, where of course the ordinary rule of presumption would be in favor

⁽¹⁾ 9 Hare, 449; 21 L. J. (Ch.), 69.

⁽²⁾ 35 L. J. (Ch.), 69.

⁽³⁾ Ir. Rep., 1 Eq., 455.

⁽⁴⁾ 2 Edon, 224; Amb., 624.

⁽⁵⁾ Law Rep., 2 Eq., 134.

⁽⁶⁾ 2 Atk., 275.

⁽⁷⁾ 3 Ves., 478.

⁽⁸⁾ 19 Ves., 435.

⁽⁹⁾ Law Rep., 1 Ch. Ap., 310.

⁽¹⁰⁾ 3 Atk., 646; 1 Ves., 64; Amb., 436.

of the articles. Here there is strong ground for believing that Barry never intended to mortgage this property to the respondents, but did what he did solely to defraud the bankers, from whom he had just before procured a large advance of money. Their loan was a real loan, while the sums which made up the £31,000 of the mortgage deed were not shown to be really owing. In such a case constructive notice must be sufficient.

In Ireland, which has long been a registry country, these matters were constantly occurring, and the rule has there been laid down plainly in a succession of cases, that the knowledge of the solicitor is the knowledge of the client, and constructive notice has *again and again been [141] held to be sufficient. *Majoribanks v. Hovenden* ⁽¹⁾ was a remarkable instance. There, A., a solicitor, was the owner of some property in right of his wife. He executed to M., in 1805, a mortgage of this property. This mortgage was not registered. In 1806, he executed a second mortgage of the same property to N., being in that instance employed by N. as her solicitor and agent. This mortgage of 1806 was duly registered. Yet in a contest for priority between these two mortgages, it was held that N. was affected with notice of the mortgage of 1805 in consequence of her having employed A. as her solicitor, and so could not rely on the priority which she would otherwise have enjoyed in consequence of the registering of the mortgage executed in 1806. Lord Chancellor Sugden there discussed all the leading cases, and expressed a clear opinion that if a purchaser employed a solicitor who had any knowledge of an incumbrance affecting the property, such knowledge must, in law, be treated as communicated to the principal, although the latter might, in fact, be wholly unconscious of the existence of the incumbrance. In a case like this it is the duty of a party to inquire, and if he abstains from making any inquiry he must take the consequence. In *Nixon v. Hamilton* ⁽²⁾, a solicitor prepared a deed of separation between man and wife, he fraudulently prevented it from being registered. Afterwards, acting as solicitor for the husband and for X. Y., who lent the husband money, he prepared another deed as security for X. Y.'s advances, and he inserted in this second deed the same property as that which was the subject of the separation settlement. X. Y.'s deed was registered, but it was nevertheless postponed to the prior unregistered settlement because of the knowledge of the solicitor being imputed to the client. *Lenahan v. McCabe* ⁽³⁾ is to the same effect.

⁽¹⁾ 1 Dru. Rep., t. Sug., 11. ⁽²⁾ 2 Dr. & Wal., 364. ⁽³⁾ 2 Ir. Eq. Rep., 342.

And that rule has been applied where the person has united in himself the character of owner of the property and of solicitor. In *Rorke v. Lloyd* ⁽¹⁾, A., who was the owner of some land and was a solicitor, made to B. a mortgage of the land on the 20th of March, 1856, this mortgage was not registered till April 3, 1859. A. made a lease of the same [42] land to C. on the 7th of March, 1859, and registered *it at once, being paid by C. for his trouble as solicitor in the transaction. It was held that A. was C.'s solicitor, and that C. was affected, through him, with notice of the prior unregistered mortgage, and the lease was postponed to the mortgage. That judgment was taken to the Court of Appeal, and was there affirmed ⁽²⁾. In *Ratcliffe v. Barnard* ⁽³⁾ the same rule of affecting the mortgagee through the knowledge of the solicitor was admitted, though it was not applied in that case, the court being of opinion that there had not been any actual negligence on the part of the mortgagee's solicitor. *Kennedy v. Green* ⁽⁴⁾ and *Whitbread v. Jordan* ⁽⁵⁾, show that where there might have been inquiry, but none has been made, constructive notice is sufficient to affect the parties.

Here, there was nothing like an advance of money, an indefinite sum was left in the hands of the husband to carry on the trade in which he and his partner had been engaged. There was no doubt private influence used to get this deed, for which, after all, there was no proof that any valid consideration had been given.

Mr. *Isaac Butt*, Q.C., Mr. *O'Hagan*, Q.C., and Mr. *Ronayne* (all of the Irish bar), were for the respondents: The real question here is as to the construction of the Act of Anne. That act (6 Anne, c. 2, Ir.) was passed in order to give effect to an object treated by the legislature as most important, and stated in the preamble to be that of "securing purchasers, preventing forgeries and fraudulent gifts, and conveyances of lands." The third section requires that "a memorial of all deeds shall be registered." The fourth section declares that all registered deeds shall be taken "as good and effectual in law and equity according to the priority of time of registering;" and the fifth section provides that "every deed not registered shall be deemed and adjudged as fraudulent and void," not only as against a registered deed, "but likewise against all and every creditors and creditor by judgment, recognizance, statute merchant, or of

⁽¹⁾ 13 Ir. Ch. Rep., (N.S.), 273.

⁽⁴⁾ 3 My. & K., 699.

⁽²⁾ 14 Ir. Ch. Rep. (N.S.), 442.

⁽⁵⁾ 1 Y. & C. Ex., 303.

⁽³⁾ Law Rep., 6 Ch. Ap., 652.

the staple, confessed, acknowledged, or entered into, as for and concerning all honors, lands," &c., "contained or expressed in such *memorial registered as aforesaid." [143] Taking these sections together it is impossible to doubt what was the intention of the legislature, and that that intention was especially to prevent the occurrence of such a case as this. The case of *Nixon v. Hamilton* (*) does not affect the present, for there the questions were whether the solicitor who prepared the second deed had not a full knowledge of the first, and if so, whether his knowledge must not affect his client, the second mortgagee, and in both matters an affirmative answer was given. No such answer could be given here. Barry was not the solicitor of Mrs. Barry, his position was hostile, not fiduciary, and therefore she could not be affected through his knowledge or his acts. The solicitor who prepared this deed, Mr. Oehme, was wholly ignorant of the preceding transactions between Barry and the bankers, and the deed which he prepared in honest ignorance of them was duly registered. The alleged equitable mortgage of the bankers was not registered; the deeds of the GortnacloUGH and Crinallow estates were asked for by Mr. Oehme, the solicitor for the respondents, and an excuse, apparently reasonable and sufficient, was given to him. He throughout acted *bona fide*. All argument about not making an inquiry was therefore excluded. The demand here made by the appellants amounted to this, that a transaction, a secret transaction, of which nobody but the parties concerned, the bankers and Barry, could know anything, and which was not registered, was to have priority over a regular and formal deed (founded, too, upon a long previous existing liability) which had been duly registered. To give it that priority would be entirely to defeat the Statute of Anne. Even if the circumstances here were not nearly so strong as they really are in favor of the respondents, the fact of registry ought to decide the matter to their advantage. *Marjoribanks v. Hovenden* (†) is an authority for the respondents. Lord Chancellor Sugden there said (‡): "The only difficulty is that this is a conflict between a registered and unregistered instrument, and that in cases of registry it has been held that direct notice is requisite. I am disposed to follow those decisions, and, as between a registered and an unregistered deed, not to bind the party who has the *legal priority [144] by any casual circumstances, which in other cases might be considered as amounting only to constructive notice." The decision in that case, therefore, did not affect the question of

(*) 2 Dr. & Wal., 364.

(†) Dru. Ch. Rep., t. Sug., 11.

(‡) Ibid., 22.

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the validity and force of the registry, but was owing to the fact that not merely a constructive notice to the solicitor had been proved there, but that he knew really everything connected with the transaction, and so the rule of a client being bound by the knowledge of his solicitor became applicable. In *Chadwick v. Turner* ⁽¹⁾ it was expressly declared that a title which has been registered can only be affected by clear and distinct notice amounting, in fact, to fraud. That was a case on the Registry Act for the East Riding of Yorkshire (6 Anne, c. 35), which resembled in all its material points the other Registry Acts of that reign. In *Hewitt v. Loosemore* ⁽²⁾, though it was admitted that the knowledge of the solicitor would bind the mortgagee who employed him, yet if that solicitor was himself the mortgagor, his employer would not be bound by any uncommunicated fact which it was the interest of such a mortgagor to conceal from the mortgagee. Here the mortgagor was not the solicitor, but he had a real interest in concealing from the mortgagee what he had done. And that case also decided that a legal mortgagee will not be postponed to a prior equitable one on the ground that the title deeds have not been got in, unless there had been, in that respect, fraud or wilful negligence on the part of the legal mortgagee, and that neither fraud nor wilful negligence will be imputed to a mortgagee who has *bona fide* made an inquiry for the title deeds, and has received a reasonable excuse for their non-delivery. That case may well be taken as decisive of the present. *Wyatt v. Barwell* ⁽³⁾ decides that notice to avoid a registered deed must be clear, distinct, and positive; and *Ratcliffe v. Barnard* ⁽⁴⁾ shows that mere omission by the solicitor to examine all the title deeds will not be sufficient to fix the legal mortgagee with constructive notice of a prior equitable charge.

The case of *Wormald v. Maitland* ⁽⁵⁾, where it was held that constructive notice of a prior unregistered incumbrance [45] affecting *lands in Middlesex is as effectual as actual notice, cannot be supported. Such was the opinion of Lord Justice Christian in this very case, founding himself on the authority of Lord Chancellor Sugden in *Marjoribanks v. Hovenden*, and of Lord Chancellor Brewster in a case of *Russell v. Cushell*, decided in Trinity Term, 1867. The latter case was not reported, but it had appeared satisfactory to the Lord Justice, from his examination of it, as stated in Mr. Madden's work on Registration. In that case Lord

⁽¹⁾ Law Rep., 1 Ch. Ap., 310.

⁽⁴⁾ Law Rep., 6 Ch. Ap., 652.

⁽²⁾ 9 Hare, 449; 21 L. J. (Ch.), 69.

⁽⁵⁾ 35 L. J. (Ch.), 69.

⁽³⁾ 19 Ves., 435.

Chancellor Brewster had expressly declined to follow the case of *Wormald v. Maitland*. *Plumb v. Fluvitt* ⁽¹⁾ is an early and an important case, and was referred to as such by Lord Justice Christian. There title deeds were deposited as a security for money; a creditor of the mortgagor fearing his immediate insolvency, not having notice of this equitable incumbrance, took a conveyance of the same premises; and this conveyance was held good. Lord Justice Christian, quoting that case, introduced the circumstance of the existence of a registry, and expressed his opinion that a person who takes the legal estate without the deeds, has a preferable title to him who takes the deeds without the legal estate, and without even registering the agreement which constituted him an equitable mortgagee. Of course that mode of putting the matter implies an absence of fraud, and there is not the slightest ground to impute fraud in this case. The respondents knew nothing of the real circumstances and situation of Barry; he appeared to be a man of wealth; he put himself forward as such; he was believed to be purchasing estates in Ireland; he sat in Parliament as a member for an Irish county, and in every respect seemed to be a man who was to be trusted. Acting in natural confidence upon these circumstances the respondents, to whom a large debt was justly due, and who, in this matter, were acting as trustees for the children of a deceased person, took the security of a legal mortgage and showed their good faith by registering it. A merely unregistered equitable mortgage cannot be set up against a registered legal mortgage taken under such circumstances; nor can it be alleged, as in *Kennedy v. Green* ⁽²⁾ or in *Whitbread v. Jordan* ⁽³⁾, that there had been wilful negligence or wilful avoiding of inquiry when the circumstances should have induced the parties to *make it. [146 There were no such circumstances here. This case more resembles that of *Jones v. Smith* ⁽⁴⁾, where Vice-Chancellor Wigram divided cases of constructive notice into two classes, first, where there was actual knowledge of the fact that the property was incumbered in some way, and the party about to take a security on it did not inquire in what way, so that the court bound him by constructive notice; or secondly, cases in which the court has been satisfied that he had designedly abstained from inquiry for the very purpose of avoiding notice. Here the respondents had not only no knowledge, but they had no suspicion, of any existing in-

⁽¹⁾ 2 Anstr., 432.⁽²⁾ 3 My. & K., 699.⁽³⁾ 1 Y. & C. Ex., 303.⁽⁴⁾ 1 Hare, 43; 11 L. J. (Ch.), (N.S.), 83.

cumbrance; and they do not fall within either of those classes of cases.

Mr. *Fry* replied.

The LORD CHANCELLOR (Lord Cairns): My lords, although this case has occupied a considerable time at your lordships' bar in the very able arguments which you have heard, I do not propose to detain you at any length in expressing the opinion which I have been able to form upon the case.

My lords, there are some facts in the case which appear to me to be proved beyond all possibility of dispute. The bankers obtained their security, an equitable security, in the year 1865. Mrs. Barry, the executrix, and her trustee, obtained their security and registered their security in the year 1866. It appears to me to be clear upon the evidence, after reading both the evidence in chief and the cross-examination, that, at the time the security of October, 1866, was given, there were undoubtedly claims existing on the part of Mrs. Barry, as executrix of her former husband's estate, against the late Mr. Barry, who was then her husband. It appears to me to be clear beyond all doubt that Mrs. Barry urged her husband to give her a security upon his property in respect of those claims, and that she repeated that demand, or that request, from time to time during the weeks or months that elapsed before the security was actually given. It farther appears to me to be clear upon the evidence of Mr. Oehme, the solicitor who was appointed to prepare the security which Mr. Barry was about to give to his wife as executrix, that so [47] far as Mr. Oehme was concerned he had actually *no notice whatever of the prior equitable charge which had been given to the bank. And, my lords, I am bound to say, looking at the evidence in this case, it appears to me to be entirely beyond the power of the appellants to challenge in this case the general character of Mr. Oehme, or to impute to him here any wilful participation in a fraud.

That being the state of the case as to the facts, the ground, and the only ground, which I can find alleged on the part of the appellants for the purpose of defeating altogether the security given to the executrix, is this, that Mr. Oehme did not obtain from Mr. Barry the title deeds of the estates over which the security was given, and that he did not investigate the titles to those estates. Now, as regards the title deeds, it is proved, and there is no statement to the contrary, that Mr. Oehme asked Mr. Barry for the title deeds. It is said that he asked for those deeds, not to hold them as part of the security, but, in order, by means of the contents of those title deeds, to prepare the security with more accuracy. That

may be a just observation, but at the same time, asking for the title deeds in this way, he was told, in England, that the deeds were at the residence of Mr. Barry in Ireland. That was a very natural, plausible and credible statement, and he accepted that statement; and the circumstance that he was told that they were in Ireland might account not merely for their not being produced to him, for the purpose of the preparation of the security, but also for the fact that they were not handed over to him upon the occasion of the execution of that security.

But what your lordships have to consider is, the effect of the circumstances to which I have referred upon a security for land situated in a country where a system and law of registration prevail. Your lordships have been referred to the Act of Anne, which established a registry of deeds in Ireland, and your lordships have been referred to the authorities which have been decided with reference to the state of the law of registration since the passing of that act. My lords, any person reading over that act of Parliament would perhaps in the first instance conclude, as has often been said, that it was an act absolutely decisive of priority under all circumstances, and enacting that under every circumstance that could be supposed, the deed first registered was to take *precedence of a deed which, although it might be [148 executed before, was not registered till afterwards. But, by decisions which have now, as it seems to me, well established the law, and which it would not be, I think, expedient in any way now to call in question, it has been settled that, notwithstanding the apparent stringency of the words contained in this act of Parliament, still if a person in Ireland registers a deed, and if at the time he registers the deed either he himself, or an agent, whose knowledge is the knowledge of his principal, has notice of an earlier deed, which, though executed, is not registered, the registration which he actually effects will not give him priority over that earlier deed. And, my lords, I take the explanation of those decisions to be that, which was given by Lord King in the case of *Blades v. Blades* (¹), upwards of 150 years ago, the case which was mentioned just now at your lordships' bar. I take the explanation to be this, that inasmuch as the object of the statute is to take care that, by the fact of deeds being placed upon a register, those who come to register a subsequent deed shall be informed of the earlier title, the end and object of the statute is accomplished if the person coming to register a deed has, *aliunde*, and not by means of the regis-

(¹) 1 Eq. C. Ab., pl. 12, p. 358.

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ter, notice of a deed affecting the property executed before his own. In that case the notoriety, which it was the object of the statute to secure, is effected, effected in a different way, but effected as absolutely in respect of the person who thus comes to register as if he had found upon the register notice of the earlier deed. If that is so, your lordships will observe that those cases depend, and depend entirely, upon the question of actual notice either to the principal, or to the agent whose knowledge is the knowledge of the principal.

But, my lords, have authorities gone any farther than to the length which I have stated? Has it ever been decided, with regard to a register act such as that which prevails in Ireland, that negligence in not asking for the title deeds, or not taking up the title deeds, shall postpone a registered security? I am not going to say a word with regard to the effect of negligence of that kind in a country like England, where there is no general registration of deeds and no act of [149] Parliament like the Irish act. But I am *unable to discover any principle upon which mere negligence and mere failure to take all the securities that might be taken, could, in a country subject to a law like the Irish Register Act, postpone a registered deed. It appears to me that the object of such a statute as the Irish statute is to give a premium to diligence in registration; and to say that if the question is merely a question of greater or less diligence, greater or less care, the advantage enures to the person who shows his diligence by first registering his own deed. Of course you may have cases in which there may be such a course of conduct as was indicated in *Kennedy v. Green* ⁽¹⁾, commented on in the case of *Jones v. Smith* ⁽²⁾ by Vice-Chancellor Wigram—conduct so reckless, so intensely negligent, that you are absolutely unable to account for it in any other way than this, that, by reason of a suspicion entertained by the person whose conduct you are examining that there was a registered deed before his, he will abstain from inquiring into the fact, because he is so satisfied that the fact exists, that he feels persuaded that if he did inquire he must find it out. My lords, I do not wish to express any decided opinion at this moment upon a case of that kind. If such a case should arise, I do not desire to say whether, in my opinion, such a case could or could not be deemed sufficient to get rid of the provisions of the Irish Registry Act. But what I do say, with great confidence, to your lordships is, that the present case does not resemble that; there is no such negligence here as, to my mind, carries with it any appearance of fraud. The conduct of Mr.

⁽¹⁾ 3 My. & K., 699.

⁽²⁾ 1 Hare, 43; 11 L. J. (N.S.), Ch., 83.

Oehme, the solicitor in this case, appears to me to be natural under the circumstances, and not to be tainted with anything which could have even the imputation of *mala fides* cast upon it.

Well, my lords, are there cases which bear a contrary import to that which I have endeavored now to express? There is a case which was before Vice-Chancellor Stuart, the case of *Wormald v. Maitland* ⁽¹⁾; and with regard to that case I can only say, that if it is to be held as deciding, that in a register country, with such a statute as exists in Ireland, the mere circumstance that, on the occasion of a marriage, the abstract of title to the property settled *was not examined on behalf of the lady about to be married, and on behalf of the children who might be born, the mere fact that there was not this examination would postpone the registered settlement—if that is the effect of the decision, I am unable, my lords, to say that that is a decision which commends itself to my judgment. It appears that in the case of *Allen's Estates* ⁽²⁾, which was decided in Ireland, the learned judge in the Landed Estates Court founded his decision upon this case of *Wormald v. Maitland* ⁽³⁾; but it appears, from what was said in the present case by the Lord Justice Christian, that, at the time the learned judge of the Landed Estates Court so decided, he was not aware that the then Lord Chancellor of Ireland (Lord Chancellor Brewster) had, in *Russell v. Cushell* ⁽⁴⁾, decided in opposition to the view expressed in *Wormald v. Maitland* ⁽⁵⁾. I cannot take, therefore, that case as an authority governing or affecting the present case; and that case being removed out of the way, there is absolutely no authority that I am aware of in support of the proposition of the appellants.

That, my lords, would dispose of the present case, but for a question which has arisen as to the form of the decree. The decree, as it stands, does not direct a general account of all advances made, out of the estate of the testator, to the late Mr. Barry, but it directs an account upon the footing of a particular sum expressed in the bond and mortgage deed of the year 1861, a sum of £2,500, or thereabouts. It assumes that that sum is part of the larger consideration stated in the deed of 1866, and directs an account upon the footing of that sum as to how much of it remains due. My lords, I should have thought that the more regular and more convenient course would have been to direct a general account

⁽¹⁾ 35 L. J. (Ch.), 69.

⁽²⁾ Ir. Rep., 1 Eq., 455.

⁽³⁾ 35 L. J. (Ch.), 69.

⁽⁴⁾ Not reported, but mentioned in Madden on Registration.

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of all advances made out of the assets to, or of all assets received by, the late Mr. Barry, and if the question were here for the first time, I cannot but think that your lordships would be disposed to direct the accounts somewhat in that manner. But, my lords, the appellants would prefer, if there is to be an account, that it should be in the form in which it has been directed in the court below; and the respondents certainly have not *shown their anxiety to alter the form of account by presenting any cross appeal. I am not at all prepared to admit, for a moment, that it is not competent to your lordships, on being asked to review a decree directing an account of this kind, to consider, independently of the views of the party appealing, what is the proper form in which the account should be directed. But, at the same time, it does not appear to me that any substantial injury would be done to either party here by leaving the account in the form in which it is already directed, and which I do not think either side has strenuously urged should be altered, unless for the purpose, as the appellants contend, of having the bill dismissed altogether. I do not, therefore, propose to advise your lordships to make any alteration in the form of the account. I notice the point lest it should be thought to have escaped your lordships' observation, but in accordance with what I have said, I think the justice of the case will be met by simply dismissing the present appeal, and dismissing it with costs.

LORD HATHERLEY: My lords, I entirely concur in the view that has been expressed by the noble and learned lord on the woolsack as to the course which it is incumbent upon us to pursue under the peculiar circumstances of this appeal.

I confess, my lords, that when the case was opened, as it was with great ability by Mr. Fry, I did become anxious to investigate somewhat narrowly the exact position of the parties with reference to the execution of the deed of the 5th of October, 1866. Observations were made by him, which made some impression upon my mind, as to whether *mala fides* existed in the representation of the consideration for that deed. After the full discussion that the case has since received, and after all the sifting that the evidence has undergone, I am now satisfied that, at all events on the part of Mrs. Barry, whatever might have been Mr. Barry's views or objects, there was no cognizance whatever, and there is no ground whatever to suspect her cognizance, of an account having been made out which was in itself fictitious and fraudulent.

It turns out that, beyond all dispute, deeds were executed in 1861, to which the court below has, I think most justly, attributed *full validity. As far as regards all that [152 was secured by the bond and the mortgage of 1861 there was not any question at all.

The question that arose was as to the additional amount comprised in the security of 1866. I say "the additional amount," because I have not any doubt whatever, for it is fully and clearly sworn to, and on cross-examination that statement has in no way been displaced, that the documents of 1861 did form a part of the consideration for the £31,000 secured by the documents of 1866. As to the remaining portion of that charge it was made out in a way much more open to observation. It is stated now that it was ascertained with regard to the jute manufactory, which had been carried on in partnership by Mr. Mackay and Mr. Barry, that no account of the partnership had been taken after Mr. Mackay's death—that Mr. Barry, who a year or two subsequently married the widow of Mr. Mackay, had been allowed, as surviving partner, to retain the whole of the assets—that after that time steps were taken which led to a sale of the property—and then it was, as Mrs. Barry represents very naturally, and in a mode which I think is entitled to all credit, that she began to have misgivings as to whether or not she had sufficient security for the debt which was due to her as executrix, and began to press her husband for some security for that debt.

I think there is quite enough to prove that you cannot impute to Mrs. Mackay, even if you should treat this account itself as not correctly made out, a knowledge of any fraudulent manufacture of accounts for the purpose of making out a consideration.

I think, upon this evidence, we must almost assume as a fact that the concern had been profitable, because it was sold, as everybody admits, to a company for a payment in shares, which company expected, I suppose, to receive some profits from it. We arrive, then, at the fact that Mrs. Barry must have been aware that her late husband had made certain profits; we also arrive at the fact that she had no knowledge of any part of her husband's share of the profits having been paid over, or accounted for in any way to her as executrix. There were, therefore, profits that ought to have come to her, profits that she had not received, and profits for which she was going to lose all security upon the sale *of the business. I think, under these circumstances, [153 it is a great deal too much to say that she ought to have

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known that there was some erroneous statement as to the exact amount of those profits—that there were some deductions which ought to have been made which were not made. It is enough for me if I arrive at the conclusion that she might reasonably and *bona fide* believe that the sum due to her on the undisputed deed of 1861, and the sum due to her in respect of profits as to which she would be entitled to have security, would amount, or might reasonably be taken as far as she knew, to amount to such a sum as was included in the purchase deed.

It is not sufficient to say that she had not gone through the whole of this account if we, sitting here in judgment upon the whole of the case, can arrive at the conclusion that she might reasonably believe it to be a true and correct account. Upon that point I have satisfied myself.

Having satisfied myself of Mrs. Barry's honesty in the transaction, I then proceed to see what is the evidence that would induce your lordships to follow decisions which would postpone the registered security of 1866 to the unregistered security granted to the appellants in 1865, on the ground that knowledge, not actually existing in Mrs. Barry's mind, must be imputed to her of the security which had been effected in 1865. Now as regards the facts of that part of the case, I have not, after carefully examining the evidence, the slightest hesitation in coming to the conclusion that Mr. Oehme knew nothing of that matter whatever. He was told that, as to the Gortnaclough and Crinallow properties, the deeds were at Lota, near Cork; the instructions being at that moment given to him in London by Mr. Barry, who was then himself in London. He farther distinctly declares, upon cross-examination, that although he soon afterwards became acquainted with the liabilities and embarrassments of Mr. Barry, he did not then know of any such embarrassment, or of Mr. Barry being in difficulties, until after the execution of the deed of the 5th of October, 1866, his first intimation, I think, having been derived from the action having been brought by or on behalf of the present appellants on the 25th of October, 1866. Why, then, should he have on his part any suspicion of any impropriety in the [154] transaction? *He would know that there had existed this previous partnership in the jute concern; he would know that Mr. Barry had subsequently married the widow of his former partner; he would know that this gentleman was desirous of giving his security, and he would have handed to him (as a matter of fact he deposes to it in his affidavit) the deed of 1861, by which he would see that

security had already been taken to a certain extent, and that what was wanted was farther security for providing, to an increased extent, for the debt.

It is said, however, that his suspicions should have been aroused when certain documents were handed to him purporting to be a description of parcels taken from the very deeds; and also when the amount of the debt for which the security was to be given and prepared by him, having been originally stated to be £16,000, was afterwards stated to be £31,000. As regards the documents being copied from the deeds, it by no means necessarily follows that he should have been brought to that conclusion or that having been told that the deeds were at Lota in Ireland, he should have said, you might have brought me these deeds to see what they were; you have taken the description of the parcels from them, and therefore, why did you not, instead of giving me the descriptions of the parcels taken from the deeds, give me the deeds themselves? It is all very well to say that now, after it is found out that this deception has been perpetrated upon the present appellants. But I apprehend that it would be going far beyond anything that is to be found in *Jones v. Smith* (*), or in *Hewitt v. Loosemore* (†) to say, that having once been told that the deeds were in Ireland, he should, after some other information was given to him, have pursued a variety of other inquiries, turning round in suspicion upon his employer and saying, you told me just now that the deeds were in Ireland; now you have produced another paper which you must have taken from them. To say that a suspicion of this sort must have crossed his mind, and that if he did not act upon this suspicion he is to be held guilty of a wilful determination not to have his eyes opened, would be to say what is not warranted. It would be perfectly monstrous to hold *any [155 doctrine of that sort. He is amply relieved from that by what had previously taken place.

My lords, although I have carefully gone into this part of the case, I wish to guard myself by saying that it is not necessary for the decision of this case, to say anything upon the distinction with regard to the doctrine of wilful ignorance, and imputation of knowledge, for the purpose of setting aside transactions conducted in an ordinary way in a country where no register exists, as contrasted with a country where, as in Ireland, or with places where, as in Middlesex and Yorkshire, registers do exist. I can easily conceive that a distinction may well be held to exist between the

(†) 1 Hare, 43; 11 L. J. (N.S.), Ch. 83.

(*) 9 Hare, 449; 21 L. J. (N.S.), Ch. 69.

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necessary searches, the omission of which will be considered by a court as indicating wilful negligence on the part of a person preparing a security, when he has to conduct his business in the ordinary way, between vendor and purchaser, or mortgagor and mortgagee, in a country where no registration exists, and a country where a register does exist. Especially is there a distinction when he is told in the register country that everything that is not upon the register is, as against him, fraudulent and void. The purchaser registers his deed, and having placed his deed upon the register, assumes that everything he can possibly require for the purpose of his own protection is done, there not being any previous incumbrance upon the register, and he *bona fide* knowing of none. Then the question comes to be whether he is bound to make a strict search and inquiry, by the examination of a person coming to him to prepare a security, as to what he may know with respect to what deeds there may be outstanding, or the like. There is a very wide difference between the case of a person who has the safeguard, as he supposes, of the register for his protection, and the case of a person who has to rely only upon these ordinary means of information.

But it seems to me that it would be somewhat extraordinary to give the advantage to a person who has neglected to give the information to others which by registering he would give, and who has thereby (if this doctrine be true, that on such extremely light grounds of comparison the knowledge can be imputed to a person taking a subsequent deed), enabled his mortgagor, or vendor, to commit a fraud [56] upon a subsequent purchaser or mortgagee. And *it would be the more extraordinary to give him this advantage because in the transaction a solicitor has been employed, and that solicitor may, by some negligence or other, but in perfect good faith, have omitted to make due inquiry. I say it would be an extraordinary thing to allow the person, who in the first instance has been guilty of gross negligence in not registering the deed, (contrary to the words of the act of Parliament), to obtain the advantage of priority over the person taking the subsequent instrument, although that person had neither himself, or through his solicitor, the slightest actual knowledge of the previous transaction, which can only be brought home to him by the doctrine of imputed or constructive notice. I must say, when the time comes for considering that question, I should like to consider it a little more fully before holding that it can give such a right as is here asserted. However, my lords, in this

case, as I have said before, I do not think any such right can be asserted as against Mr. Oehme.

Then there remains only a single question, namely, as to whether Mr. Barry is to be taken to be the agent of Mrs. Barry in this transaction, so as to fix a knowledge of the fraud upon Mrs. Barry. My lords, it appears to me that that is directly contrary to, instead of following, the case of *Le Neve v. Le Neve* (¹). In that case Mr. Le Neve, the husband, knew everything: he employed the solicitor as Mr. Barry employed his solicitor here. Lord Hardwicke did not stop to inquire about the position of the husband; that was a known, an acknowledged; it was an admitted fact in the case. What he said was: The husband has employed this solicitor, and I must inquire whether this solicitor knew anything of the transaction; and, finding that he did, finding that he had been consulted about, and had even assisted the husband in perpetrating the fraud, Lord Hardwicke came to the conclusion (whether that conclusion has been repudiated by different judges since or not) that under those circumstances, through the guilty knowledge of the solicitor, although he was innocently employed as far as regarded the lady herself, she, the lady, must be implicated, and must suffer the loss. How can that compare for one moment with the position of the husband himself in the case? Really, if *the doctrine is to be carried so high as that, [157 where is it to stop? If a person asks a friend to recommend a solicitor, who afterwards happens unfortunately to be mixed up with a fraud, under the circumstances of the case you could not deal with him as an intermediate agent, and as having that knowledge which would have served to postpone the incumbrancer.

I think, my lords, happily, in this case we have none of those questions presented to us. It is quite sufficient for me to say that I do not think that Oehme's position has been brought within *Hewitt v. Loosemore*, or any of those other cases; and therefore I think that, upon every ground, Mrs. Barry is entitled to retain her security, and that this appeal should be dismissed with costs.

LORD SELBORNE: My lords, I entirely agree with the opinions which your lordships have expressed. It has been said in argument that investigation of title and inquiry after deeds is "the duty" of a purchaser or a mortgagee; and, no doubt, there are authorities (not involving any question of registry) which do use that language. But this, if it can properly be called a duty, is not a duty owing to the possi-

(¹) 3 Atk., 646; Amb., 436; 1 Ves., 64.

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ble holder of a latent title or security. It is merely the course which a man dealing *bona fide* in the proper and usual manner for his own interest, ought, by himself or his solicitor, to follow, with a view to his own title and his own security. If he does not follow that course, the omission of it may be a thing requiring to be accounted for or explained. It may be evidence, if it is not explained, of a design inconsistent with *bona fide* dealing, to avoid knowledge of the true state of the title. What is a sufficient explanation, must always be a question to be decided with reference to the nature and circumstances of each particular case; and among these the existence of a public registry, in a country in which a registry is established by statute, must necessarily be very material. It would, I think, my lords, be quite inconsistent with the policy of the Register Act, which tells a purchaser or mortgagee that a prior unregistered deed is fraudulent and void as against a later registered deed—I say it would be altogether inconsistent with that policy to hold that a purchaser or mortgagee is under an obligation to make any inquiries with a view to the discovery of [58] *unregistered interests. But it is quite consistent with that, that if he or his agent actually knows of the existence of such unregistered instruments when he takes his own deed, he may be estopped in equity from saying that, as to him, they are fraudulent.

With regard to the account, the appellants, failing altogether to overturn the respondents' security, cannot be heard to ask that the form of the account shall be altered in their favor without letting in all such alterations as will be proper to make it, in all respects, right, to whatever party these alterations may prove most beneficial. Rather, however, than do that, they elect that their appeal shall be dismissed with costs, and I think, under all the circumstances, it is proper that it should be so dismissed.

Order appealed from affirmed; and appeal dismissed, with costs.

Lords' Journals, 15th June, 1874.

Solicitors for the appellants: *Ashurst, Morris & Co.*

Solicitors for the respondents: *Holmes, Anton, Greig & White.*

Where there is sufficient upon the face of the papers or in the facts of the transaction to put a purchaser upon inquiry, he is not entitled to be considered a *bona fide* holder. *Safford v. Wyckoff*, 4 Hill, 442; *McBride v. Far-*

mers' Bank, 26 N. Y. Rep., 455; *Ely v. Norton*, 2 Abb. Ct. App., Dec., 397, S. C. 3 Keyes, 397; *Mining etc. v. Windham etc.*, 44 Verm., 495; *Avery v. Johann*, 27 Wisc., 246, 250-1; *Green v. Early*, 39 Md., 223; *Taylor v. Baker*,

5 Price, 306; *Anderson v. Nicholas*, 28 N. Y., 600; *Gould v. Stevens*, 43 Verm., 125, 5 Am. Rep., 267; *Huff v. Wagner*, 63 Barb., 215; *Hager v. Wilson*, 63 Barb., 237; *Hosley v. Holmes*, 27 Mich., 416. See *Penny v. Walts*, 1 MacNaghten and Gordon, 150, and Mr. Perkins's note to Am. ed.; *Austin v. Vandermark*, 4 Hill, 259.

One who has knowledge of the existence of papers, is bound to take notice of their contents. *Hosley v. Holmes*, 27 Mich., 416. Every person taking a conveyance of real estate, takes it with constructive notice of whatever appears in his chain of title, even though such incumbrance be unrecorded. *Baker v. Mather*, 25 Mich., 51.

Unless on making diligent and proper inquiry, he fail to learn of the rights of another, and is deceived upon such inquiry by the party who possesses such rights. *Johnson v. Hathorn*, 2 Abb. Ct. App. Dec., 465, S. C. 2 Keyes, 476; *Avery v. Johann*, 27 Wisc., 251.

The notice should be of facts sufficient to put a prudent man on inquiry. *Baker, v. Bliss*, 39 N. Y., 70.

The rights of a purchaser of commercial paper, are not to be affected by constructive notice, unless it clearly appears that the inquiry suggested by the facts disclosed at the time of the purchase, would, if fairly pursued, result in the discovery of the defect existing, but hidden at the time. There must appear to be in the nature of the case such a connection between the facts disclosed, and the further facts to be discovered, that the former may be said to furnish a clue—a reasonable and natural clue—to the latter. *Birdsall v. Russell*, 29 N. Y., 220, reversing 1 Rob., 538; *Austin v. Vandermark*, 4 Hill, 259.

But mere knowledge that a note was given in consideration of an executory contract, is not sufficient notice of a breach of such contract. *Davis v. McCready*, 17 N. Y., 230. See *Sawyer v. Chambers*, 48 Barb., 628.

Nor that a note was given for a patent right. *Hereth v. Merchants Bank*, 84 Ind., 380; *Sackett v. Kellar*, 22 Ohio St. R., 554; *Borden v. Clark*, 26 Mich., 410.

Although the bona fide purchaser of commercial paper will only be protected to the extent of the amount advanced thereon. *Huff v. Wagner*, 63 Barb.,

215; *Hurger v. Wilson*, 63 Barb., 237; *Holcomb v. Wyckoff*, 85 New Jersey Law Rep., 35; *Warner v. Burden*, 49 N. Y., 286.

Possession alone is frequently sufficient notice of the rights of the party in possession. *Penny v. Walts*, 1 MacNaghten and Gordon, 150.

The purchaser of a bond and mortgage who fails to require the production of the bond, is chargeable with notice of any defect in the assignor's title thereto, although he learn on inquiry of the mortgagor that he has not been notified of any assignment. *Kellogg v. Smith*, 26 N. Y., 18.

See *Cothran v. Collins*, 29 How., 118.

Payment to an agent who has possession of the evidence of indebtedness—a bond and mortgage—is a valid and binding payment. *Williams v. Walker*, 2 Sandf. Chy., 825; S. C. 3 N. Y. Leg. Obs., 204; *Hatfield v. Reynolds*, 84 Barb., 612.

Otherwise if the payment be made before the money is due. *Burrough v. Cranston*, 2 Irish Eq. Rep., 203.

Or if the agent do not have possession of the evidence of indebtedness. He who claims the benefit of such payments must show the agent had such possession each time he made the same. *Williams v. Walker*, 2 Sandf. Chy., 825.

So of a payment to the mortgagee who does not produce it. *Brown v. Blydenburgh*, 7 N. Y., 141; *Irish v. Colwell*, 31 Penn. St. Rep., 228; *Mitchell v. Bristol*, 10 Wend., 492. But see *Foster v. Beals*, 21 N. Y., 247; *Lynch v. Tibbetts*, 24 Barb., 51.

Payment of a portion of the principal to an agent with power only to receive the interest, is not a valid payment: a ratification of such payment must be made with an intention to adopt such acts, or the position of the party paying must be changed in consequence thereof. *Kent v. Thomas*, 1 Hurl. & Norm., 478.

But a purchaser of a stolen bond in open market is not bound to make a close and critical examination to detect alterations of numbers. *Birdsall v. Russell*, 29 N. Y., 220, reversing 1 Rob., 538. See 6 Eng. Rep., 120 note; *Seydel v. National, etc., Bank*, 54 N. Y., 288; *Dutchess Co., etc., v. Hatchfield*, 4 N. Y. Supreme Ct. Rep., 153; 47 How. Prac. Rep., 330; 1 Hun, 675.

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Mere negligence will not be sufficient to prevent one becoming a *bona fide* purchaser. *Welch v. Sage*, 47 N. Y., 143; see note 5 Am. Rep., 266 note; *Belmont Branch Bank v. Hoge*, 35 N. Y., 65; *Head v. Smith*, 44 How. Prac., 478. But see *Cothran v. Collins*, 29 How. Prac., 113; *Id.* 155.

[Law Reports, 7 House of Lords, 158.]

June 30, 1873. May 15; June 22, 1874.

JOHN BAIN and JOHN PATERSON, Plaintiffs in Error; and
RICHARD FOTHERGILL and T. ALERS HANKEY, Defendants in Error⁽¹⁾.

Contract for sale of Real Estate—Breach of—Damages for.

Upon a contract for the sale and purchase of a real estate, if the vendor, without fraud, is incapable of making a good title, the proposing purchaser is not entitled to recover compensation in damages for the loss of his bargain.

F. was in possession of a mining royalty under a written agreement for a lease, of which he had taken an assignment. One of the stipulations of the agreement was that H. (the person with whom the agreement was originally made) should not assign without the license of the lessors. They were ready to consent to the assignment to F. provided he would execute a duplicate of the agreement containing this stipulation. Though repeatedly communicated *with on the subject he delayed doing so. He entered into a contract with B. to sell his interest in the royalty, it was afterwards found that the lessors absolutely refused their assent to the transfer, and F. was unable to perform his contract with B. In an action by B. against F. for its non-performance:

Held, that B. could only recover the expenses he had incurred, but not damages beyond them.

Flureau v. Thornhill⁽²⁾ adopted and affirmed.

Hopkins v. Grazebrook⁽³⁾ overruled.

Per LORD CHELMSFORD: The rule laid down in *Flureau v. Thornhill*⁽²⁾ as to the limits within which damages may be recovered upon the breach of a contract for the sale of real estate, must be taken to be without exception. If a person enters into a contract for the sale of real estate, knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot, in an action for breach of the contract, recover damages beyond the expenses he has incurred. Any other damages must be the subject of an action for deceit.

Per LORD HATHERLEY: A contract for the sale of real estate is very different from a contract for the sale of a chattel. In the former the purchaser knows that there must, with all the complications of our law, be an uncertainty as to making out a good title; in the latter the vendor must know what his right to the chattel is.

THIS was a writ of error on a judgment of the Exchequer Chamber, which had affirmed a previous judgment of the Court of Exchequer⁽⁴⁾ in an action brought by Bain & Paterson to recover damages for the breach of an agreement, dated the 17th of October, 1867, by which Fothergill & Hankey undertook to sell, and transfer, to Bain &

⁽¹⁾ Affirming L. R., 6 Excheq., 59.

⁽²⁾ 6 B. & C., 31.

⁽³⁾ 2 W. Bl., 1078.

⁽⁴⁾ Law Rep., 6 Eq., 59.

Paterson their interest in a certain mining royalty in the county of Cumberland, known as "Miss Walter's Royalty."

Anthony Hill, the former owner of the Plymouth Ironworks at Merthyr Tydvyl, held under an agreement for a lease, dated the 19th of October, 1861, the royalty in question. The lease was to be a lease for twenty-one years, as from the 20th of March, 1860, at a rent of £100 a-year and a royalty rent of 2s. 2d. per ton of ore raised. Mr. Hill died in August, 1862, and in August, 1863, his executors contracted with Fothergill & Hankey to sell them his interest in this agreement. It was one of the conditions of Hill's agreement that he should not assign or sublet without the assent of the lessors. When Hill's executors made this contract *with Fothergill & Hankey, who appeared to [160 have succeeded him at the Plymouth Ironworks, they applied to the lessors for a consent. The lessors were willing to give it, provided that Fothergill & Hankey would themselves execute a duplicate of the assignment, in which was repeated the proviso that they were not to underlease or assign without the consent of the lessors. A consent in writing was accordingly prepared in duplicate, and on the 16th of June, 1865, one part was executed by the lessors, and their solicitors, retaining that part, sent the other part to the solicitors of Fothergill & Hankey to obtain the execution of it by their clients. It was not executed by them, although there were numerous communications on the subject, and had not been executed by them at the time when they entered into the contract with Bain & Paterson, of Harrington, in the county of Cumberland, for the sale of their interest in the royalty. The contract for that sale consisted of an offer and acceptance. The important parts of it were these, "We offer to sell you our interest in the 'Miss Walter's Royalty,' in Cumberland, on the following terms: £2,500 to be paid us in cash on our handing you a transfer of the said royalty," a rent of £300 a-year during the remainder of the term, and a royalty of 1s. a ton beyond the royalty payable under the original agreement, such additional royalty to merge in the additional rent of £300 a-year, and a deposit of £250 was to be paid forthwith; to which was added this clause, "The usual covenants for our protection as standing between our lessors and you to be made by you."

This offer was signed by Fothergill for himself and his company, and underneath were written these words, "We accept of offer on terms stated. Bain & Paterson." The deposit was forthwith paid. Fothergill wrote and signed at

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the foot of the agreement these words, "I confirm this (*sic*) within and acknowledge the receipt of your check for £250." Bowerbank, the agent for Miss Walter's Royalty refused any consent till the required duplicates should have been signed. Fothergill by letter informed him that the interest in the royalty had been disposed of to Bain & Paterson, and requested him to facilitate the needful transfer. In a letter of the 4th of November, 1867, addressed to Fothergill, Bowerbank said: "Yours of the 2d to hand, and in [161] reply beg to *say I cannot understand how you could dispose of the royalty without my consent. A document was sent on the 16th of June, 1865, to your solicitors in London, for your signature, which has not yet been returned. As soon as that document is returned you will then know in what position you are as to disposing of the royalty without our consent."

Several letters passed between the parties, and on the 13th of November, 1867, Fothergill wrote to Bain & Paterson a letter in which he said, "To-day for the first time I have seen the consent to the assignment of the agreement between Joseph Walters and others with the late Mr. Anthony Hill to the Plymouth Iron Company, by which I learn for the first time, that a similar consent is necessary between the Plymouth Iron Company and yourselves. It is a sad pity that we should have both been ignorant of the condition, for it appears to me that unless the consent can be obtained by you, our arrangement of the 17th of October must fall through, for I have evidently made no impression upon Mr. Bowerbank. Please, therefore, to try what you can do and let me know, as, if unsuccessful, we must return you the deposit money. I send you copy of consent to the assignment referred to, and, if you can suggest any way of overcoming the difficulty, we will do all in our power to assist." Bain & Paterson answered on the 14th of November, 1867, "We do not feel disposed to give up the contract, and it appears to us that the onus of obtaining license from lessors lies with you," but they promised "to do all in our power to mediate with Mr. Bowerbank." On the 16th of November, Fothergill wrote again, "I regret much to hear of your non-success with Mr. Bowerbank. That this difficulty should have turned up is most vexatious to us, but your Mr. Paterson will remember that when he commenced the negotiation with me I distinctly and repeatedly told him that I was not informed upon the conditions under which we held it. I cannot therefore see how the onus lies with me. As you put it, a condition exists of which I certainly

knew nothing, exacting a consent which I have no means of obtaining, and which I am advised is absolutely essential to action, and which consent both you and I have tried in vain to obtain. Is it not, therefore, better to abandon an arrangement which we cannot carry through."

*The royalty was in September, 1868, sold by Fothergill & Hankey, through the intervention of Mr. Bowerbank, and at his desire, to a Mr. Stirling, and Fothergill offered to return to Bain & Paterson the deposit of £250, which offer was not accepted.

Bain & Paterson then commenced this action, in which they sought to recover the deposit, interest, and expenses, and in addition, damages for the loss of their bargain. The defendants paid into court a sum sufficient to cover the deposit, interest, and expenses. The facts were turned into a special case and argued before the Court of Exchequer, and on the 15th of November, 1870, that court pronounced judgment, declaring that the claim for damages was not sustainable. This judgment was affirmed in the Exchequer Chamber, no arguments being heard, as it was the intention of the parties to bring up the case to this House.

The judges were summoned, and Mr. Baron Martin, Mr. Justice Keating, Mr. Baron Pigott, Mr. Justice Brett, Mr. Justice Denman, and Mr. Baron Pollock attended (').

The *Solicitor-General* (Sir G. Jessel), and Mr. *Herschell*, Q.C., for the plaintiffs in error: The real question here is, whether the decision in *Flureau v. Thornhill* (") is to be supported, and to what extent it is to be applied? In that case, it was held that a contractor for the purchase of a real estate to which the title proves (without collusion) defective, is entitled to no satisfaction for the loss of his bargain. That doctrine was there laid down for the first time, and there is no justification for it in the enactments of any statute, or in the principles of the common law. Its age, therefore, now about 100 years, will not alone support it as a valid decision. There ought to be a line of cases recognizing and adopting it, in order to make it a valid and binding authority now. There is nothing of the kind. It will be seen that when it came to be applied in a direct manner, it was not adopted; it was distinguished. Its principle is known not to apply to a sale of chattels, *why should [163 it be made to apply to a sale of land? The supposed rule does not exist in any other country—certainly not in Scot-

(') The case was heard before Lord Hatherley. Lord Colonsay died before Chelmsford, Lord Colonsay, and Lord judgment was delivered.

(") 2 W. Bl., 1078.

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land, where civil law principles are followed—nor even in the United States, where the prevailing law is founded upon our own common law. That is the first point in the case.

The second point is, that even if *Flureau v. Thornhill* ⁽¹⁾ was good law, it does not apply to a case like the present. It applies only to a case where the vendor is in possession, has a title, and has never had reason to believe that his title was defective. Here that was not the case. And this farther limitation may be added, that the defectiveness of the vendor's title ought not to arise in any way from his own default. Here it did directly so arise, for Fothergill knew that he had in fact no title to the property, and that the lessors would not confer one till he signed the duplicate which had been left at his solicitors, but which he had always neglected to execute.

In *Flureau v. Thornhill* ⁽¹⁾ Lord Chief Justice De Grey says: "If the title proves bad, and the vendor is (without fraud) incapable of making a good one, I do not think that the purchaser can be entitled to any damages for the fancied goodness of the bargain which he supposes he has lost." And Mr. Justice Blackstone remarks, that, "These contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit with interest and costs is all that can be expected." There is no authority of any kind referred to as justifying these propositions. The judge at the trial had thought that no damages could be given; but the jury had given damages contrary to that opinion. The motion was for a new trial on that account, and the majority of the court granted it, but Mr. Justice Nares hesitated about granting the rule; and Mr. Justice Blackstone sought to prove that no injustice could be done in the case, for that on a sale and resale of stock the loss which the verdict was intended to compensate could not have occurred. It is clear that that case has little weight as an authority.

Then came the case of *Hopkins v. Grazebrook* ⁽²⁾. There a person who had contracted for the purchase of an estate, [64] but had *not obtained a conveyance of it, put it up for sale, engaging to make a good title by a certain day, which he could not do, as he did not get his conveyance. The purchaser from him was held entitled to recover not only expenses, but also damages for the loss sustained by not having the contract carried into effect. In that case, Lord Chief Justice Abbott said: "If it is advanced as a general proposition that where a vendor cannot make a good title

⁽¹⁾ 2 W. Bl., 1078; see 1 Esp., 868.

⁽²⁾ 6 B. & C., 31.

the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it." And then, taking the particular facts of that case, he held the vendor to be liable in damages for a breach of contract. The supposed general principle of non-liability to damages was therefore deliberately discountenanced, and the fact that the vendor had by his own fault occasioned the breach of contract, was held sufficient to fix him with liability. That case completely establishes the right of the plaintiffs here. There is no principle of law adverse to their title to ask for damages, and the conduct of the defendants has been such as to make them responsible. In *Walker v. Moore* (*), where the plaintiff sought to sustain a claim of this sort, he had seen the abstract of title, but never referred to the deeds mentioned in it. On the abstract the title appeared good; when the deeds were examined it appeared defective, and he was held not entitled to recover damages for the loss of his bargain. But that was because he had had full opportunity of knowing everything, and had chosen to act without making himself acquainted with the facts presented to him. That case, therefore, was not in opposition to *Hopkins v. Grazebrook* (*), and Mr. Justice Bayley founded his decision on the circumstance that they were "very different" from each other. Nor does the case of *Sikes v. Wild* (*) affect the present, for there, though the general remarks of Chief Justice Erle appear to sustain the doctrine in *Flureau v. Thornhill* (*), his decision really went on the ground of *bona fides* on the part of the vendor who had, when he sold the land, full reason to believe that he could make a good title, who had not concealed anything, and had been guilty of no default of his own. But even in that case, when it was originally decided in the Court of Queen's *Bench, Lord Chief Justice Cockburn expressed it [165 clearly as his opinion that the defendants were liable, observing (*): "I can see no reason, in the absence of authority, for extending the immunity to parties who, knowing that they have not any estate to convey, take upon themselves to sell, in the speculative belief that they will be able to procure the interest and title before they are called upon to execute the conveyance." The principle thus expressed had been acted on in *Robinson v. Harman* (*), where a man who had only a life interest in certain rent contracted to grant a lease of the land itself. In that case Baron Parke

(*) 10 B. & C., 416.

(*) 6 B. & C., 31.

(*) 1 B. & S., 587; 4 B. & S., 421.

(*) 2 W. Bl., 1078.

(*) 1 B. & S., 596.

(*) 1 Ex., 850.

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declared the rule of the common law to be, "that where a party sustains a loss by means of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed." And both Baron Parke and Baron Alderson treat *Flureau v. Thornhill* (1) not as having laid down a rule of law, but as having engrafted an exception on the rule of the common law. In principle the decision in *Flureau v. Thornhill* (1) cannot be supported, though in *Sikes v. Wild*, Lord Chief Justice Erle endeavors to support it by the observation (2) that, "the damages in the case of land may vary indefinitely. A small fragment of land may be almost invaluable with reference to the comfort of the purchaser, but the value of chattels may be replaced by delivery of their market price," a remark which entirely disregards the *pretium amoris*, which is as applicable to certain chattels as it can be to certain land.

In *Engel v. Fitch*, (3) mortgagees sold the lease of a house and undertook to give possession on the completion of the purchase. The title was good, but when the time arrived, the mortgagor, who was in actual possession, refused to quit. The purchaser was held entitled to recover damages as well as expenses. That case was carried to the Exchequer Chamber (4), and the judgment was affirmed. All these cases show that when the fault of the non-completion of the contract can properly be imputed to the party himself, and is the result of his own acts, or, as in this last case, could be set right by his acts, the disappointed purchaser has a right to recover damages as well as expenses. In this respect the judgments of Lord Chief Justice Cockburn and Lord Chief Baron Kelly may be taken as in opposition to that of Lord Chief Justice Erle, and the principle seems to be in favor of the former. If the impossibility to perform the contract arises from some unanticipated difficulty of a legal sort in the perfecting of the title, it may well be that the innocent vendor may be excused from the payment of damages, for, as Mr. Justice Blackburn said in *Lock v. Furze* (5), "from the complicated nature of our law of real property, no man can be certain that he has a perfect title to his estate." But when it is the consequence of his own negligence, or still worse, of his refusal to do what is necessary to be done in order to perform the contract, the vendee is entitled to damages. It is the vendor's own wrong, and he ought to com-

(1) 2 W. Bl., 1078.

(2) 4 B. & S., 428.

(3) Law Rep., 3 Q. B., 314.

(4) Law Rep., 4 Q. B., 659.

(5) Law Rep., 1 C. P., 453.

pensate the vendee whom he has made to suffer from it. These principles have, in themselves, been recognized by Lord *St. Leonards* in his *Vendors and Purchasers* (*), though he thinks *Flureau v. Thornhill* (*) to have been rightly decided. His opinion must have depended on the circumstances of the case, and it may be considered as agreed in the profession that *Flureau v. Thornhill* (*) extended only to cases of mere defectiveness of title, and had no reference whatever to cases in which personal conduct was in the least degree concerned.

Recent cases have proceeded on this distinction. *Lock v. Furze* (*) expressly decides that *Flureau v. Thornhill* (*) did not apply to a case where a lease was pretended to be granted by a person who had in reality no title to grant it. And in *Godwin v. Francis* (*), where a man pretended to sell without getting the consent of his co-owners to the sale, the court held that the action was maintainable, and that the proper measure of damages to which the purchaser was entitled for the breach of contract was the cost of investigating the title, the costs he had been put to in unsuccessfully endeavoring to enforce his purchase, and the difference between the contract price and the market price of the *estate; [167 and the price for which the estate was afterwards sold was treated as *prima facie* evidence of the market price. In that case *Flureau v. Thornhill* (*), *Hopkins v. Grazebrook* (*), and *Engel v. Fitch* (*), were all cited and commented on, and the case must therefore be considered as the latest exposition of judicial authority on the subject. It is a very strong case in favor of the plaintiffs here, for in that case there was no actual personal misconduct of the defendant which could be alleged as the cause for the non-performance of the contract, and which he could at once have remedied. He had merely mistaken his own authority to act for his co-owners of the property. Here it is contended that the defendant's inability to perform the contract arose from the continued negligence of Fothergill to do what the lessors had a right to require.

Mr. *Manisty*, Q.C., and Mr. *Holker*, Q.C. (Mr. *J. R. Mellor* was with them), for the defendants in error: The attempt here is to overrule a case which was decided nearly a hundred years ago, and has been acted upon ever since. For in no instance has that case been really impugned, but it has

(1) 13th Ed., pp. 300-302, citing *Bratt v. Ellis and Jones v. Dyke* (MSS.)

(*) 2 W. Bl., 1078.

(*) Law Rep., 1 C. P., 441.

(*) Law Rep., 5 C. P., 295.

(*) 6 B. & C., 31.

(*) Law Rep., 3 Q. B. 314.

only been said that the particular circumstances of other cases rendered it inapplicable to them. And not one judge nor even one text writer has denied it to be good law. On the contrary, Lord St. Leonards is clearly in its favor: Vendors and Purchasers⁽¹⁾. The question has always been whether the particular case before the court fell within the rule or was an exception to it. The decisions in the cases already quoted do not affect the rule laid down in *Flureau v. Thornhill*⁽²⁾. Even *Hopkins v. Grazebrook*⁽³⁾ did not. That case merely showed that where there was personal fault attributable to the vendor he might thereby make himself liable to damages. That was shown, too, most clearly in the observations of Lord Chief Justice Jervis and of Mr. Justice Vaughan Williams in *Pounsett v. Fuller*⁽⁴⁾, where all the cases were fully examined, and it was held that the purchaser of a real estate was not entitled to compensation [68] for the loss of his bargain where the vendor, *though he could not make a title, had, when he contracted to sell, reasonable grounds for supposing that he could do so. There the vendor knew that by a written agreement he possessed the right of shooting over a particular estate, and believing that agreement to be a complete title to the right, he sold the right to another person. His title was defective because there had been no grant of this right under seal, and he was sued for damages, but was held not to be liable to pay them. That case was the counterpart of the present. Here the vendor was really in possession, and, as he believed, under a complete title; he entered into a contract for the sale of his right, but his title was defective for a reason similar to that which existed in *Pounsett v. Fuller*⁽⁴⁾; there was a necessity for somebody else to make his good equitable title a complete legal title. It was not his fault that this was refused, and he was not liable to damages for the refusal.

There can be no doubt that *Hopkins v. Grazebrook*⁽³⁾ did introduce one very strong restriction on the case of *Flureau v. Thornhill*⁽²⁾, and has always been so considered in the profession, and for that reason it has not been approved. In Vendors and Purchasers⁽¹⁾ the cases are commented on, and Lord St. Leonards says: "But *Hopkins v. Grazebrook*⁽³⁾ has not been followed. It would be difficult to support it, for the seller, in the view of equity, had an equitable title, and such sales are clearly valid in equity; although if a man were a mere land jobber, and bought an estate, and before a conveyance, and without having paid for it, carried it

(1) 13th Ed., c. 9, s. 3, p. 301.

(2) 2 W. Bl., 1078.

(3) 6 B. & C., 31.

(4) 17 C. B., 660; 25 L. J. (C.P.), 145.

at once into the market with a view to profit, that might be considered a case of fraud, and an attempt to sell, at an improved price, the original seller's estate, and thereby involve him and the sub-purchaser in litigation. Short of circumstances amounting to fraud, the case seems to fall within the general rule. In the later cases of *Walker v. Moore* (¹), and *Pounsett v. Fuller* (²), the courts followed *Flureau v. Thornhill* (³), without expressly overruling *Hopkins v. Grazebrook* (⁴), but the decisions in those cases do, in effect, overrule the decision in that case. It has always appeared to the writer that the distinction taken in the latter case **[Hopkins v. Grazebrook]* could not be supported [169 without overruling *Flureau v. Thornhill* (⁵), and it is much too late to impeach the authority of that case, which, moreover, was properly decided." This opinion was first published by Lord St. Leonards in 1857, and has since been repeated by him in the later editions of his work.

This distinction as to cases where there is personal blame attributed to the vendor and cases where there is none, has been adopted in America. In *Sedgwick on Damages* (⁶) it is said: "Where the vendor has no title whatever, and holds himself out as the proprietor where he is not," the vendee is entitled to damages; and this opinion is, in different terms, repeated in other places (⁷).

In *Engel v. Fitch* (⁸) Lord Chief Baron Kelly says: "We are far from wishing to throw any doubt on *Flureau v. Thornhill*" (⁹); and afterwards, upon fully stating what was the decision in that case, he says: "We are far from dissenting from that proposition in the most extensive terms it can be laid down." That case having been so long recognized, the great principle of law that the rules of law should be certain, and that it is most mischievous to render them un-

(¹) 10 B. & C., 416.

(²) 17 C. B., 660; 25 L. J. (C.P.), 145.

(³) 2 W. Bl., 1078.

(⁴) 6 B. & C., 31.

(⁵) 13th Ed., c. 9, s. 3, p. 301.

(⁶) 4th Ed., p. 202.

(⁷) *Id.*, 227-229. In p. 284 Mr. Sedgwick says: "An important exception has been introduced from the civil law in regard to damages recoverable against a vendor of real estate who fails to perform and convey the title. In these cases the line has been repeatedly drawn between parties acting in good faith, and failing to perform because they could not make a title, and parties whose conduct is tainted

with fraud or bad faith. In the former case the plaintiff can only recover whatever money has been paid by him with interest and expenses. (*Flureau v. Thornhill*, 2 W. Bl., 1078; *Hopkins v. Grazebrook*, 6 B. & C., 31; *Robinson v. Harman*, 1 Exch., 850; *Bitner v. Brough*, 11 Penn. R., 127). In the latter he is entitled to damages resulting from the loss of his bargain. (*Pounsett v. Fuller*, 17 C. B., 660). This exception cannot, I think, be justified or explained on principle, but it is well settled in practice (see *Succem v. Steele*, 5 Iowa, 352, cited *ante*, 186)."

(⁸) Law Rep., 4 Q. B., 659-667.

certain, applies, and the decision in *Flureau v. Thornhill* (¹) ought not to be disturbed.

But take *Hopkins v. Grazebrook* (²) as a case which is to be followed, then it is clear that the circumstances on which that case was decided do not exist here. The vendors here were in possession; they believed, and were justified in believing, that the property was theirs; they knew of nothing to impeach their title, and they contracted to sell what they [170] knew that they actually *possessed. There was no fraud here; there was no misconduct, and there was nothing to take them out of the rule in *Flureau v. Thornhill* (¹) and to bring them within the exception which has been supposed to be engrafted on that rule. There was a distinction between the sale of land and the sale of chattels; and even as to the latter, the rule laid down in *Hadley v. Baxendale* (³) ought to be followed. Now here it was impossible to suppose that the damages claimed by the plaintiffs could reasonably have been in the contemplation of both the parties when the contract was made, as the probable result of the breach of it, and if so they could not be made the subject of recovery after it was broken.

Mr. *Herschell* replied.

LORD CHELMSFORD proposed the following questions for the consideration of the judges:

1. Whether, upon a contract for the sale of real estate, where the vendor, without his default, is unable to make a good title, the purchaser is by law entitled to recover damages for the loss of his bargain?

2. Whether the actual possession of the property, the subject of the contract, is essential to bring the case within the rule laid down in *Flureau v. Thornhill* (¹)?

3. Whether, if the rule of law is correctly laid down in *Flureau v. Thornhill* (¹), the circumstances of the present case distinguish it and take it out of that rule?

Mr. BARON MARTIN (⁴) requested time to consider these questions.

Mr. BARON POLLOCK: In answer to the first question submitted by your lordships to the judges, I am of opinion that upon a contract for the sale of real estate where the vendor, without his default, is unable to make a good title, the purchaser is not by law entitled to recover damages for the loss of his bargain.

[171] *This was so decided as far back as the year 1775,

(¹) 2 W. Bl., 1078.

(²) 6 B. & C., 31.

(³) 9 Ex., 341.

(⁴) His lordship, though present at the hearing of the case, retired from the bench before the opinions were delivered.

in the case of *Flureau v. Thornhill* (¹), and has been acted upon and almost universally acquiesced in ever since, and the rule is in my judgment consistent with good sense, and with what may be supposed to be the intention of the contracting parties; nor does it contravene any principle of law which has been established with reference to the amount of damages that may be recovered on breach of contract.

The report of the case of *Flureau v. Thornhill* (¹) is somewhat meagre. The ground of decision, as stated by Chief Justice De Grey, is that, upon the contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, the purchaser is not entitled to any damages for the fancied goodness of the bargain. Mr. Justice Blackstone adds that these contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title.

The proposition asserted by Chief Justice De Grey, as reported, might, no doubt, be stated in more accurate language, but its meaning is sufficiently clear, and the decision has been followed in all subsequent cases in which the facts have been substantially the same. Many of these, including *Walker v. Moore* (²), and *Sikes v. Wild* (³), were cited in argument at your lordships' bar, and the law is, by Lord *St. Leonards* in his last edition of *Vendors and Purchasers* (⁴), considered as settled. Other cases were referred to in which a different measure of damage was acted upon, but in these the circumstances also were different. In *Hopkins v. Grazebrook* (⁵) the vendor, when he contracted to sell, had substantially no estate, and the conditions of sale contained a distinct undertaking to make a good title. Lord Chief Justice Abbott, no doubt, said, in giving judgment, that he should desire time to consider before he assented to the general proposition that, where a vendor cannot make a good title, the purchaser shall recover no more than nominal damages, and Bayley, J., appears to ground his decision upon the fact that the vendor held out the estate as his own, when, in fact, he had only an equitable title; but I can find *nothing said by either of these very learned judges [172 which ought to lead me to doubt the correctness of the view taken in *Flureau v. Thornhill* (¹), or to disturb a rule which for nearly a hundred years has been acted upon in a matter of constant occurrence.

In *Robinson v. Harman* (⁶) the defendant agreed to grant

(¹) 2 W. BL. 1078.

(²) 10 B. & C., 416.

(³) 4 B. & S., 421.

(⁴) Chap. viii., s. 3.

(⁵) 6 B. & C., 31.

(⁶) 1 Ex., 850.

a valid lease when he well knew that he had no power to do so. In *Engel v. Fitch* (¹), in which there was given an elaborate and exhaustive judgment of the Court of Queen's Bench, confirmed by the Exchequer Chamber, the defendants, who were mortgagees of a lease, but not in possession, sold it to the plaintiff, undertaking by the particulars of sale that possession should be given on completion of the purchase, and on the faith of this the plaintiff resold at a profit. The title was good, but on the plaintiff requiring possession it was found that the mortgagor was in possession and refused to give it up, and farther, that the defendants could have ousted him by ejectment, but refused to incur the necessary expenses. Under these circumstances, the judges in the Queen's Bench held that the plaintiff was entitled to recover, not merely the deposit and expense of investigating the title, but also damages for the loss of his bargain, and in giving the grounds for their judgment on the particular case, said that "the rule in *Flureau v. Thornhill* (²) can have no application where the failure, either to make out a title or to give possession, arises not from the inability of the vendor, but from his unwillingness either to remedy a defect in the title, or to obtain possession on the score of expense."

It was urged by the learned counsel for the plaintiffs in error, that the rule laid down in *Flureau v. Thornhill* (³) was anomalous, and differed from that which is usually applied to the assessment of damages where there has been a breach of a contract for the delivery of goods, and therefore that it ought not to be upheld. It is scarcely correct to say the rule is anomalous; that it differs from that applicable to a contract for the sale of goods is true, but the subject matter to which it is applied differs also.

It is observable in following the history of the rule in question that when it was first laid down in *Flureau v. [73] Thornhill* (⁴) the *whole question of the proper measure of damages had not received from our courts the attention which it has done in later years. Moreover, at that time, although it had never been expressly so decided, it was commonly supposed that upon the sale of a chattel, in the absence of any warranty of title, the rule of *caveat emptor*, as laid down in *Co. Litt.* (⁵), and by *Noy* in his *Maxims* (⁶), applied, and, therefore, the suggested anomaly probably was not present to the minds of the judges who decided *Flureau v. Thornhill* (⁷); but assuming that the

(¹) Law Rep., 3 Q. B., 314; *Ibid.*, 4 Q. B., 659.

(²) 2 W. Bl., 1878.

(³) Page 102, a.

(⁴) C., 42.

difference exists, as it now undoubtedly does, there are two marked distinctions affecting the present question between a contract for the sale of personal and of real property.

In the first place, a man who sells goods must be taken to know whether they are his or not. Secondly, he must be aware that in the majority of cases the goods he is selling are intended for resale, or to be used by the buyer for the purpose of construction or manufacture, so that both the title of the vendor and the probable result of his deficiency may fairly be presumed to be in the minds of the contracting parties.

With real property the case differs in both these respects. First, no layman can be supposed to know what is the exact nature of his title to real property, or whether it be good against all the world or not; hence, as was said by the court in *Engel v. Fitch* (*), the undoubted owner of an estate often finds, unexpectedly, a difficulty in making out a title which he cannot overcome. Assuming that the vendor acts *bona fide* the difficulty must be equally known to the vendee as to the vendor.

Secondly, to enter into a contract for the purchase of land in order immediately to resell it before the title is examined, is unusual and exceptional.

It seems, therefore, more reasonable to treat the mere contract for the conveyance of land not as based upon an implied warranty, that the vendor has power to convey, but as involving the condition that the vendor has good title, and that if, on examination of the abstract this turns out not to be so, the vendee cannot ask to be put in as good a position as if a conveyance with the usual *covenants had been [174] executed, but can only recover the expenses to which he has been put. All that has been hitherto said leads to the conclusion that the case of *Flureau v. Thornhill* (*) was rightly decided, at the time it was decided, on sufficient legal principles, but if it was a decision to which at the time I could not have acceded, I should, nevertheless, think that a contract of purchase and sale of real property made at this day must be construed to be made on the footing of that decision being correct. All persons who prepare such contracts know of that decision, and that it has been acquiesced in and acted on for a hundred years. The contracts which such persons prepare are, therefore, made with the understanding that, upon failure to make out a satisfactory title, the rule as to damages enunciated in that case will be ap-

(*) Law Rep., 3 Q. B., 814; Ibid., 4 Q. B., 659.

(*) 2 W. Bl., 1078.

plied. Then such rule is by intention and understanding of the parties a part of the contract.

Your lordships' second question is: "Whether the actual possession of the property, the subject of the contract, is essential to bring the case within the rule laid down in *Flureau v. Thornhill*?"⁽¹⁾

Such actual possession is not, I think, necessary. If I am right in what I have already stated as to what are the true grounds upon which that rule is founded, this seems to follow. In seeking to arrive at a conclusion whether the statements of a vendor as to his title are *bona fide* or otherwise, so as to take the case out of the rule in *Flureau v. Thornhill* (¹), it may be material to inquire, among other facts, whether the vendor was in actual possession or not, but, assuming his *bona fides*, the fact ought not, in my opinion, to affect the question. A man who has never been in actual possession may often have better grounds for believing, and therefore may be better entitled to act upon the belief, that his title is good, than another who has been in possession for some time. Thus A. may have bought Blackacre; the abstract of title may have been investigated, and the conveyance executed without possession being taken, whilst B. may have been for months in possession of a family estate, his title to which may not only be doubtful, but may actually be at the very time in litigation.

In either of these cases, on a sale by A. or B. of the whole [175] or a *portion of the property, it may turn out, either from a more thorough investigation, or from the decision of the court, that A. or B. had not good title to what he had sold, but in both these cases the facts might be such as ought to protect the vendor, if he had been guilty of no *mala fides*, from a liability to pay, as damages, any loss sustained by the vendor arising from his failing to reap the profits of a good bargain.

Lastly, in answer to your lordships' third question, the circumstances of the present case do not distinguish it or take it out of the rule laid down in *Flureau v. Thornhill* (¹).

The property in question, which the defendants had agreed to sell to the plaintiffs, consisted of iron ore mines, called Miss Walter's Royalty, and formed a small portion of a large mining estate which the defendants had purchased in 1863 from the executors of one Hill. The defendants entered into possession of the whole estate, but the purchase had not been completed upon the 17th of October, 1867.

On that day the defendants agreed to sell to the plaintiffs

(¹) 2 W. Bl., 1078.

the defendants' interest in Miss Walter's Royalty. Upon inquiry it appeared that Miss Walter's Royalty was held by Hill under an agreement for a lease for twenty-one years from March, 1860, and that agreement contained a clause providing against the assignment or subletting of the premises without the consent of the lessors in writing.

Before the 17th of October one of the defendants who negotiated the sale had been informed that it would be necessary to obtain the consent of the lessors for an assignment to third parties of the defendants' interest, but it is found as a fact that at the meeting on the 17th of October, 1867, between one of the plaintiffs and one of the defendants, when the sale was negotiated, this necessity did not cross the mind of the latter, or if it did occur to him he forebore to mention it, feeling sure that no difficulty would arise in respect to such consent, and that it was therefore a matter of no importance. After this the defendants did all that was in their power to obtain the lessors' consent to assign, but failed to do so.

The defendants therefore acted with perfect *bona fides*, and the *contract failed, not because the defendants did [176 not do what they could have done to make a good title, but because the defendant who personally negotiated the contract overlooked a fact which might, and in the event did, prevent them from making a good title to the plaintiffs.

Under these circumstances it seems to me that there existed in this case all the material facts which bring it within the decision in *Flureau v. Thornhill* (¹), and none of those which had been held to create an exception to that rule.

My learned brothers the Lord Chief Baron, Mr. Justice Keating, and Mr. Justice Brett, concur in the opinion which I have had the honor to express to your lordships.

MR. JUSTICE DENMAN: In answer to the first question put by your lordships, I am of opinion that upon a contract for the sale of real estate when the vendor, without his default, is unable to make a good title, the purchaser is not by law entitled to recover damages for the loss of his bargain. I answer your lordships' question, in its terms, upon the assumption that I am thereby in substance only stating that, in my opinion, the doctrine laid down in the case of *Flureau v. Thornhill* (¹) is a part of the law of the land, binding upon all courts of justice, and only to be altered, if at all, by the legislature. I must, however, at once add that the rule down in *Flureau v. Thornhill* (¹) is, in my opinion, more limited in its operation than might be con-

(¹) 2 W. Bl., 1078.

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tended for upon several possible constructions of the words "without his default unable to make a good title," as I shall endeavor to explain hereafter.

In the argument for the plaintiffs in error it was powerfully contended that *Flureau v. Thornhill* ⁽¹⁾ could not be law because it was not founded on any principle; because it was at variance with the ordinary rules of law applicable to the question of the damages recoverable upon a breach of contract, and because it was merely judge-made law, the origin of which was apparent in the case itself.

It may be admitted that the case of *Flureau v. Thornhill* ⁽¹⁾ is not a wholly satisfactory case. The report is [77] meagre, and the *judgments unargumentative; but the case cannot truly be said to be founded on no principle. It has been frequently explained upon a principle which cannot be called unreasonable, and even in cases in which nice distinctions prevailed and prevented its operation from being held applicable, some of the most learned judges, while declining to act upon it, have recognized it as binding, and explained the principle on which it rests. For example, in *Robinson v. Harman* ⁽²⁾, Parke, B., in speaking of *Flureau v. Thornhill* ⁽¹⁾, says, "It was there held that contracts for the sale of real estate are merely on condition that the vendor has a good title" (adopting the judgment of Blackstone, J.), and then adds, "so that when a person contracts to sell real property there is an implied understanding that if he fail to make a good title the only damages recoverable are the expenses which the vendor may be put to in investigating the title." The same principle is shortly expressed by Blackburn, J., in the case of *Sikes v. Wild* ⁽³⁾, in the words, "It is implied from the usage of this particular business."

Nor do I think that *Flureau v. Thornhill* ⁽¹⁾ is bad law because it is at variance with the ordinary rules applicable to damages on breach of contract. It has from time to time, as fresh cases have arisen, been found necessary to lay down rules for the guidance of juries in the assessment of damages. *Hadley v. Baxendale* ⁽⁴⁾ is a notable instance of such a rule laid down a few years ago, and now recognized as a part of the common law. The very fact that the rule laid down in *Flureau v. Thornhill* ⁽¹⁾ has been for nearly a century recognized and acted upon as a known limitation in respect of the damages upon breach of a contract for the sale of real estate, seems almost sufficient to answer the argument founded upon the anomalous character of the rule.

⁽¹⁾ 2 W. Bl., 1078.

⁽²⁾ 1 Ex., 855.

⁽³⁾ 1 B. & S., 591.

⁽⁴⁾ 9 Ex., 341.

Still less do I think that the argument against the rule in question, that it is "Judge-made law," ought to prevail. Difficult as it is to lay down any precise rule or definition as to the extent of acquiescence which will amount to conclusive evidence that the law as laid down in any judicial decision is a part of the common law of England, and granting that no rule ought to be laid down *which should [178 prevent your lordships from overruling any decision clearly contrary to good sense, however ancient it might be, I am of opinion that the case of *Flureau v. Thornhill* ('), as understood in subsequent cases, and as limited by your lordships' question, is neither absurd nor unreasonable; and that it has received an amount of subsequent judicial recognition sufficient to stamp it as part of the undoubted common law, to be noticed by all courts, and not to be overruled except by the legislature. The exact extent of the rule, and the limits of its operation, I propose to consider in my answer to the second and third questions proposed by your lordships.

In answer to the second question put by your lordships, I am of opinion that the actual possession of the property, the subject of the contract, is not essential to bring the case within the rule laid down in *Flureau Thornhill* ('). In order to consider this question, it appears to me to be necessary to explain my view of the exact effect and extent of the ruling in *Flureau v. Thornhill* ('), which, in my opinion, has sometimes been supposed to go farther than the words, or the reasons of the judgments, as reported, really go. The report, after stating the purchase by the plaintiff at an auction of a rent issuing out of a leasehold house for £270, and payment of a deposit of £20, states that "*on looking into the title the defendant could not make it out.*" From this I conclude that it was an ordinary case of a person in possession of property, with a holding title, and without any knowledge of any defect in his selling title, discovering for the first time, on investigation of the matter, that he has not such a title as a purchaser could be compelled to take. In such a case, and in such a case only, as it appears to me, does *Flureau v. Thornhill* ('') decide that the ordinary rule relating to damages for breaches of contract does not apply to sales of real estate. The language of De Grey, C.J., and Blackstone, J., seems to me quite applicable to such a case, and not strictly applicable to any other. The former says, "Upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a

(') 2 W. Bl., 1078.

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'good one';" by which I understood him to refer to a discovery made subsequently to the making of the contract. 179] Mr. Justice Blackstone says, "These *contracts are merely upon condition, frequently expressed, but always implied, that the vendor has a good title. If he has not, the return of the deposit, with interest and costs, is all that can be expected." These words do not very correctly express that which they have been always understood to mean, viz., that the contract is one made upon the terms that if the title is not good the damages shall be limited as described; but there is no difficulty in understanding what Mr. Justice Blackstone meant, and I apprehend it is clear that when he speaks of an "implied condition that the vendor has a good title," he cannot have intended to include the case of an intending vendor *knowing* that he has not a good title, and neglecting to disclose the fact to the intended purchaser before the contract is made.

Before dismissing the case of *Flureau v. Thornhill* (') it may be desirable to refer to two cases to be found in notes in the Appendix to *Sugden's Vendors and Purchasers*, which have been sometimes cited as proving that the case of *Flureau v. Thornhill* (') had a wider operation than that above explained. The first of these is *Bratt v. Ellis* ('). That case, however, can scarcely be cited as an authority for any particular proposition, inasmuch as the decision is only to the effect that the defendant should be let in to plead after a verdict against him on a writ of inquiry, including £250 for loss of bargain, upon payment into court of the deposit money and interest, and on payment to the plaintiff of costs. What became of the action does not appear.

The other case, *Jones v. Dyke* ('), was an action against a firm of auctioneers who professed to be authorized to sell certain estates in Wales, tried before Macdonald, C.B., at the Hereford assizes. The only part of the report affecting the present question is the following passage: "It appearing that the defendants had no authority to sell, the plaintiff had a verdict *by consent* for £261; the judge thinking the items of which that sum was composed reasonable, but the plaintiff did not obtain any damages for the loss of his bargain," from which it would appear that at most this was only a ruling at *nisi prius*; and in all probability one given 180] *under such circumstances as would have precluded either party from afterwards objecting to it.

(') 2 W. Bl., 1078.

(') Sug., V. & P., 11th ed., Ap. No. 4.
See p. 656 in the 13th ed., where these

two cases are only referred to, but not set forth.

(') Ibid., No. 5.

Both these cases appear to have been decided between 1804 and 1808, from the dates which appear in the notes, and I can find no case throwing any light upon the subject down to the case of *Hopkins v. Grazebrook* (¹), decided in the year 1826, which I will now consider. In that case the declaration stated that the defendant caused the premises to be put up to sale by auction, subject to conditions that the purchaser should immediately pay a deposit, and should pay the residue of the purchase-money on the subsequent 25th of March, *and on payment to be let into possession*, and a proper conveyance should be executed by the vendor, *who undertook to make a good title* (which he did not do, nor did he execute a proper conveyance), whereby plaintiff was deprived of all benefit to be derived from the purchase, and put to great expense. The defendant pleaded the general issue, and paid into court the amount of the expenses which the plaintiff had been put to, and a small sum for nominal damages for the breach of contract. The facts proved at the trial were extremely similar to those found in the case now before your lordships. The premises in question were part of a property belonging to Hill & Co., they had contracted to sell to one Harwood, and the defendant had agreed to purchase from Harwood. Owing to some misunderstanding which arose between Hill & Co. and Harwood, the conveyance to Harwood was never executed. The report goes on to state that the defendant *expecting that the matter would be arranged*, and that the contract between Harwood and himself would be carried into effect, put up the premises to auction, *as stated in the declaration*, but that, in consequence of the disputes between Hill & Co. and Harwood, he was unable to complete his contract. It was admitted that he had acted *bona fide*. The learned judge, Garrow, B., told the jurors that they were not bound to confine their verdict to nominal damages, and they having found a verdict for £70 beyond the sum paid into court, the full court, consisting of Abbott, C.J., Bayley, Holroyd and Littledale, JJ., refused a rule, moved pursuant to leave reserved, to enter a nonsuit. Before considering the judgments in that case, it may be observed that there existed the following *facts, which were wholly wanting in [*181 Flureau v. Thornhill* (²): First, there was an express undertaking to let into possession on payment of the purchase-money on a day certain; secondly, the defendant expressly undertook to make a good title; and thirdly, the defendant evidently knew that he was contracting to sell a property

(¹) 6 B. & C., 31.(²) 2 W. Bl., 1078.

upon an expectation only (though a *bona fide* one) that the contract between Harwood and himself would be carried into effect, a matter over which he must have known that he had no control. The contract, therefore, was not broken, as in *Flureau v. Thornhill* (¹), by reason of a discovery that the defendant's title was defective, but by a failure to do the very thing he had contracted to do by a certain day. Nor was it possible in that case to imply a condition "from the usage of that particular business," such as that implied in *Flureau v. Thornhill* (¹), inasmuch as the parties had expressly agreed, absolutely and not conditionally, that a good title should be made. When carefully examined, I think that all the observations of the learned judges in that case, read with reference to the facts of the case, amount to no more than a decision that mere inability to make a good title does not, of itself, bring a vendor within the rule laid down in *Flureau v. Thornhill* (¹) as to damages; but that it depends upon the nature of the contract, and also upon the reasons for the inability, whether he can avail himself of that rule: and that in such a case as that of *Hopkins v. Grazebrook* (²) a vendor was not within the rule. It is true that several expressions of Abbott, C.J., and Bayley, J., in that case have been thought to lay down more precise rules than would be the case according to the above view of it, but in my opinion the judgments are to be read as only containing some of the reasons for holding that whether *Flureau v. Thornhill* (¹) was correctly decided or not, it certainly was no authority for the proposition that under all circumstances, and whatever the cause of the default, a vendor unable to make a good title should have a right to break his contract, subject to a certain limited amount of damages; but on the contrary, that, notwithstanding *Flureau v. Thornhill* (¹), a vendor who puts up an estate to auction, contracting to make a good title and knowing he has no title, is responsible for his breach of contract in the same way and [182] to the same extent of damages as other persons breaking their contracts. It is true there are expressions in the judgments in *Hopkins v. Grazebrook* (²) which, read by themselves, would seem to imply that *Flureau v. Thornhill* (¹) could never apply where the vendor was not in possession of that which he had contracted to sell. Abbott, C.J., says: "The defendant had unfortunately put the estate up to auction before he got a conveyance. He should not have taken such a step without ascertaining that he would be in a situation to offer some title." And Bayley, J., says, "for

(¹) 2 W. Bl., 1078.(²) 6 B. & C., 31.

here the vendor had nothing but an equitable title," as though that were the test; but I think that both these expressions must be read in connection with the fact that the defendant knew he was offering a property the title to which was defective, and his ability to sell it a matter beyond his own control. Cases may easily be conceived in which a person without actual possession, but *bona fide* believing that he had a present right to convey, might be properly held entitled to the benefit of the rule in *Flureau v. Thornhill* (¹) without in any way overruling the decision in *Hopkins v. Grazebrook* (²), if I am right in my interpretation of its meaning and effect. *Pounsett v. Fuller* (³) was, in fact, such a case. There the defendant having a mere agreement from the owner of a manor for a right of shooting, but *bona fide* believing that he had a selling title, contracted to sell his right of shooting to the plaintiff. It turned out on the investigation of the title that he had no legal title. Under these circumstances it was held by the Court of Common Pleas that the rule in *Flureau v. Thornhill* (¹) applied. After an elaborate argument, in which all the cases which had then been decided were discussed, Jervis, C.J., and other judges delivered a judgment in favor of the defendant, which seems to me quite satisfactorily to dispose of this question. Jervis, C.J. (⁴), thus shortly states the ground of the decision: "Though he had not a right to sell that which he professed to sell, inasmuch as it was an incorporeal hereditament, which could only be granted under seal, yet, as a layman, he had a fair right to believe he had the power to sell which he professed to have, and, therefore, this case comes within the qualification of the rule as expressed in *Hopkins v. Grazebrook* (²) and *Walker [183 v. Moore]* (⁵). He had previously stated the effect of *Walker v. Moore* (⁵) as expressly determining "that where the party is not to blame, but professes to sell that which he *bona fide* believes he can sell, though in fact he may have no title, he is liable only for the expenses of investigating the title;"—and the case of *Hopkins v. Grazebrook* (²) as deciding that where the party enters into a contract, knowing that he cannot make a title, he is remitted to his "general liability," by which is of course meant liability to damages as in an ordinary case of breach of contract. Cresswell, J., says, "The defendant having a grant, though not a legal one, of the shooting, both parties acted under a *bona fide*

(¹) 2 W. Bl., 1078.

(⁴) 17 C. B., 678.

(²) 6 B. & C., 31.

(⁵) 10 B. & C., 416.

(³) 17 C. B., 660.

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impression that he had that to sell which he professed to sell; I cannot, therefore, see how the case can be brought within the exception in *Hopkins v. Grazebrook*"⁽¹⁾. Williams, J., uses an expression in his judgment which appears to me clearly to show that he does not take the judgment of Bayley, J., in *Hopkins v. Grazebrook* (¹), to be intended to lay down a general rule that wherever the vendor has nothing but an equitable title the rule in *Flureau v. Thornhill* (²) cannot apply. He says (³) "It is true that here the defendant had a mere equitable title; but the facts show that he did not know when he entered into the contract that he had not a perfectly good legal title. Ignorance of law is not that kind of misconduct which brings the case within the rule in *Hopkins v. Grazebrook*" (¹).

I have come to the conclusion upon the above consideration of the cases, especially that of *Pounsett v. Fuller* (⁴), which I think was satisfactorily decided, that the application of the rule laid down in *Flureau v. Thornhill* (²) does not depend upon the actual possession of the property by the vendor. I think, for instance, that it would apply in the case of a sale of property, where upon investigation of the title it should be discovered that, owing to some deed of partition, the effect of which had been misunderstood, the vendor was dealing with property A. when he had only a right to sell property B., and in many other cases which may be supposed where the contract goes off, owing to a [184] discovery *subsequent to the contract that the vendor has not a title to sell what at the time of the contract he *bona fide* supposed himself to possess.

I am, however, of opinion, in answer to the third question proposed by your lordships, that the circumstances of the present case do distinguish it and take it out of the rule laid down in *Flureau v. Thornhill* (²)

I need not here repeat the observations already made as to what I conceive to be the actual limits of the rule laid down in that case, or the extent of the qualification of its apparent generality established by subsequent cases; but I will at once proceed to state what I conceive to be the material facts stated in the present case.

It appears from the case that one Hill was possessed of certain iron ore mines, amongst others of one called Miss Walter's Royalty, by virtue of an agreement in 1861, for a lease for twenty-one years. This agreement contained a clause providing against assignment without the consent of

(¹) 6 B. & C., 31.

(²) 2 W. Bl., 1078.

(³) 17 C. B., 682.

(⁴) 17 C. B., 660.

the lessors in writing first thereto obtained. Hill having died, his executors, about August, 1863, contract to sell all the mines of Hill deceased, including his interest in Walter's Royalty, for £250,000. This purchase had not been completed when the contract, the subject of this action, was made on the 17th of October, 1867. The case then states an application by Hill's executors to Hill's lessors for their consent to the assignment to the defendants, which the lessors were willing to give if the defendants would execute a duplicate. A duplicate consent was prepared, and in June, 1865, one part was executed by the lessors and retained by them. The other part was sent to the solicitors for the executors to obtain the defendants' signature, and in the same month the solicitors for the executors sent the duplicate consent to the defendants' solicitors for their execution. The lessors' solicitors having more than once requested the solicitors for the executors to obtain the execution by the defendants of the duplicate consent, the solicitors for the executors wrote to the defendants' solicitors on the 11th of October, 1865, stating, as the fact was, that they had learnt from the lessors' solicitors that, unless the duplicate was sent back signed in a few days, the assent of the lessors would be withdrawn. The duplicate *consent re- [185 mained unexecuted in the hands of the defendants' solicitors at the time when the agreement, the subject of the action, was entered into on the 17th of October, 1867. In the meantime questions arose upon several abstracts of title relating to various parts of the property included in the agreement of August, 1863, between the defendants' solicitors and the executors' solicitors, which were not settled until October, 1868, when the purchase of all the property included in the agreement of August, 1863, was completed. Before the agreement of October, 1867, was signed the defendant Fothergill, who afterwards made that agreement, had been informed that it would be necessary to obtain the consent of the lessors for the assignment to third parties of the defendant's interest in Walter's Royalty; but at the meeting at which the contract sued upon was discussed and afterwards signed he made no mention of the necessity for such consent, as the case finds, either because it did not occur to him, or if it did, because he felt sure that no difficulty would arise in respect to such consent, and, therefore, that it was a matter of no importance. On the 17th of October, 1867, the agreement sued upon was signed, the material part of which is in the words: "We offer to sell you our interest in Miss Walter's Royalty, £2,500 to be paid us in cash on our hand-

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ing you a transfer of the said royalty. A deposit of £250 to be made us forthwith, and the whole arrangement to be carried out and accomplished as soon as may be. Signed Richard Fothergill, for &c. and self. We accept of offer in terms stated, Bain & Co., per John Paterson." Before acceding to the proposed terms Mr. Paterson asked for time to consult his partners, which was declined. The bargain was thereupon concluded, and the deposit of £250 paid. Mr. Paterson did not learn till the 22d or 23d of October that the consent of the lessor was necessary. He then wrote to Mr. Fothergill, requesting him to sign the consent, which the defendants had still to sign (alluding to the duplicate consent which remained unsigned in the defendants' possession), but though the defendants did their best to obtain the consent of the lessors, they failed to obtain such consent, in consequence of which, after attempts to make a fresh arrangement and to obtain the consent of the plaintiffs to cancel the agreement, the defendants, being unable to obtain the consent of the lessors to an assignment except to one Stirling, sold to Stirling, and the present action was commenced.

From the above statement it appears that when the contract of the 17th of October, 1867, was signed, the defendant Fothergill knew that the consent of Hill's lessors was required before Hill's executors could assign their interest to the defendants, and also that the like consent was necessary before the defendants could effectually assign their interest to the plaintiffs. The plaintiffs were not informed either of the necessity or of the non-existence of such consent. It farther appears that before the contract was signed, the defendants had had notice through their solicitor that the consent of the lessors of Hill to the assignment of his agreement with them was dependent upon the defendants doing an act which they were being pressed to do as far back as October, 1865, and which had not yet been done, and that such notice was not communicated to the plaintiffs, nor the difficulty which might obviously arise in consequence pointed out. It appears to me that under the circumstances it was so clearly the duty of Mr. Fothergill to have put the plaintiffs in possession of these facts before he allowed them to sign a contract for the purchase of the royalty, that it is impossible for the defendants to rely upon the rule in *Flureau v. Thornhill* ('). I think that the contract did not in this case go off through the *discovery* by the defendants that they could not make a good title, but by reason of the over sanguine expectation on the part of Mr. Fothergill that an obstacle, which

(') 2 W. Bl., 1078.

he *knew* to exist, and over which he had no control, would somehow or other cease to exist before the completion of the purchase. In such a case I am of opinion that the case of *Flureau v. Thornhill* (*) does not apply.

Finding myself, unfortunately, compelled to differ from the rest of my learned brethren in the answer I give to the third question asked by your Lordships' House, it is necessary for me to notice certain other decisions *in pari materia* with those already commented upon, and to consider how far they bear upon the present case, and how far they can be supported upon principle, so as to be properly regarded as binding upon your lordships, as part of the law upon the subject.

*The first of these is *Walker v. Moore* (*), already [187 referred to, decided in the year 1829, only three years after *Hopkins v. Grazebrook* (*). In that case the agreement for purchase was in July, 1827. The abstract of title was delivered in August, 1827, and returned in September with observations and a request for an appointment to examine documents. In November, before the appointment was made, notice was given by the purchaser of a proposed resale by him of a part of the property, and a part was resold. On the 6th of February the original documents were examined and the defect in the defendants' title was then discovered. In that case it was held, in perfect conformity with *Flureau v. Thornhill* (*), and not inconsistently with *Hopkins v. Grazebrook* (*), that no damages for loss of bargain could be recovered. No doubt the main ground of the decision in that case, so far at least as the judgment of Mr. Justice Bayley is concerned, appears to have been that the plaintiff was premature in selling before he had obtained an actual conveyance of the estate, but that ground itself, looking at the facts of the particular case, depended upon the doctrine laid down in *Flureau v. Thornhill* (*). Little-dale, J., so treats the matter, and says (*): "When a contract for the purchase of lands is made *each party* cannot but know that the title *may prove* defective and must be supposed to proceed upon that knowledge." And Mr. Justice Parke, in his judgment, speaks of "*a defect being found in the title*;" and states the rule in *Flureau v. Thornhill* (*) thus: "In the absence of any express stipulation about it, the parties must be considered as content that the damages, *in the event of the title proving* defective, shall be measured in the ordinary way, and that excludes the

(*) 2 W. Bl., 1078.

(*) 10 B. & C., 416.

(*) 6 B. & C., 31.

(*) 10 B. & C., 422.

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claim of damages on account of the supposed goodness of the bargain." Both these passages are wholly inapplicable to the case of one party *knowing* that a consent to his selling the property is essential and wanting, the other party being wholly in ignorance of those facts. I am, therefore, of opinion that *Walker v. Moore* ⁽¹⁾ is no authority for the defendants' contention in the present case.

The case of *Robinson v. Harman* ⁽²⁾, appears to me to be [188] a *very strong authority for the plaintiffs. That case in effect decided that where a vendor *knows* he has no title and chooses to contract for the sale of the property, he is not within the rule as to limitation of damages laid down in *Flureau v. Thornhill* ⁽³⁾. There may be some doubt whether that case is wholly reconcilable with the case of *Sikes v. Wild* ⁽⁴⁾, to be noticed afterwards, as to what constitutes sufficient *knowledge* on the part of a vendor to deprive him of the benefit of the rule; but in any case I am of opinion that the case of *Robinson v. Harman* ⁽⁵⁾ was rightly decided, because the vendor in that case, in answer to express inquiries as to his power to lease, and as to the legal estate being vested in trustees, took upon himself positively to assert that the property was his out and out, and that he alone had the power of leasing. The contract being made after such a statement, I think it was rightly held as against the vendor, that he could not set up a rule applicable only to the case where both parties are in ignorance as to whether the title will prove defective or not. He either knew in a legal sense that it was defective, or having taken upon himself to assert its perfection in a matter upon which inquiry had been expressly made, he could not set up a rule which implies ignorance of the defect in both contracting parties. I think, therefore, that his liability was properly held to be that of any person who breaks his contract, and not limited as in *Flureau v. Thornhill* ⁽⁶⁾.

In *Worthington v. Warrington* ⁽⁷⁾, decided in 1849, the doctrine in *Flureau v. Thornhill* ⁽⁸⁾ was again discussed and applied, but without in any way questioning the authority of *Hopkins v. Grazebrook* ⁽⁹⁾, or of *Robinson v. Harman* ⁽¹⁰⁾, then recently decided by the Court of Exchequer, and cited upon the argument. Mr. Justice Colman, who delivered a judgment in which the rest of the court concurred, placed his decision on grounds entirely in conformity with the view I have submitted of the true extent and appli-

⁽¹⁾ 10 B. & C., 416.

⁽²⁾ 1 Ex., 850.

⁽³⁾ 2 W. Bl., 1078.

⁽⁴⁾ 1 B. & S., 587; 4 Ibid., 421.

⁽⁵⁾ 8 C. B., 184; 18 L. J. (C.P.), 350.

⁽⁶⁾ 6 B. & C., 31.

cation of the rule. He says "every one who purchases land knows that a difficulty *may* exist as to the making a title *which was not anticipated* at the time of entering into the contract."

*The case of *Pounsett v. Fuller* (¹), decided in 1856, [189 has already been referred to. I only notice it again for the purpose of adding that I think it fully bears out the observations I have made as to the effect of the previous decisions. The only qualification of, or addition to, the law laid down in those decisions which I find in the case of *Pounsett v. Fuller* (¹) is that which is embodied in a sentence of Mr. Justice Williams' judgment (²) already cited. "Ignorance of law is not that sort of misconduct which brings the case within the rule in *Hopkins v. Grazebrook*" (³). In the present case I do not think that Mr. Fothergill's neglect to mention either the necessity, or the absence, of the required consents was in the nature of an ignorance of law, but a neglect to mention an obstacle within his own knowledge and beyond his own control, and which he *knew* to be fatal as long as it existed to his title to sell; and that the mere circumstance that he either thought nothing about it, or that he expected that the obstacle would be removed, did not entitle him to the benefit of the rule in *Flureau v. Thornhill* (⁴); but on the contrary is conclusive to show that the case is within the principle of *Hopkins v. Grazebrook* (⁵), and *Robinson v. Harman* (⁶).

I come now to the case of *Sikes v. Wild* (⁷). That was a case very peculiar in its circumstances, and led to a difference of opinion in the Court of Queen's Bench. The property in question was incumbered with an annuity, and the vendor knew that no title free of incumbrance could be made, unless the annuitant and her trustee would discharge the part sold from the trust to secure the annuity. *The annuitant had verbally agreed to transfer her security to another property*, but after the plaintiff had agreed to buy the property, the annuitant refused her consent to the transfer, and so the bargain went off. The jury found first that the defendants *bona fide* believed that they would be able to make the purchaser a good title free from incumbrance, and secondly that they had reasonable ground for so believing. After a full discussion of the cases previously decided, Mr. Justice Blackburn delivered judgment for himself and Mr. Justice Wightman in *favor of the defendants, [190

(¹) 17 C. B., 660.

(²) *Ibid.*, 682.

(³) 6 B. & C., 31.

(⁴) 2 W. Bl., 1078.

(⁵) 1 Ex., 850.

(⁶) 1 B. & S., 587; 4 *Ibid.*, 421.

holding that the rule in *Flureau v. Thornhill* ⁽¹⁾ applied. Lord Chief Justice Cockburn differed, and held that the case fell within the rule in *Hopkins v. Grazebrook* ⁽²⁾, and *Robinson v. Harman* ⁽³⁾. The judgment of the two learned judges who held for the defendants, though it expresses great doubt as to the soundness of the decision in *Hopkins v. Grazebrook* ⁽²⁾, and also as to the ground of that decision, ultimately proceeds upon the narrow ground that "it is impossible to say as a matter of law that there is misconduct in putting property up to sale without disclosing every material fact, and that the only ground for imputing misconduct was putting up the property for sale, though they knew that their power of making a title free from incumbrance was precarious, which the jury" (under the circumstances of the unretracted promise at the time of the contract) "had found to have been done *bona fide*, and not unreasonably." The judgment of the Court of Exchequer Chamber, delivered by Lord Chief Justice Erle ⁽⁴⁾, after stating the rule in *Flureau v. Thornhill* ⁽¹⁾, goes on to say, "The damages here therefore must be assessed according to the rule in *Flureau v. Thornhill* ⁽¹⁾, unless the case comes within the exception in *Hopkins v. Grazebrook* ⁽²⁾; namely, that if the intended vendor *knowingly* withholds from the intended vendee that he has not a title, he is guilty of culpable want of truth, and is bound to make the latter compensation for the loss of his bargain, and ought not to have the protection of the doctrine established by *Flureau v. Thornhill*" ⁽¹⁾. It may be observed that this is certainly a somewhat free translation of the decision in *Hopkins v. Grazebrook* ⁽²⁾. The learned Chief Justice then states the proposal made to the annuitant as to a change of the property upon which her annuity was to be charged, and goes on, "She assented, and it might reasonably have been supposed that she would continue in that mind to the last. Under these circumstances the failure to make a title does not bring the case within *Hopkins v. Grazebrook*" ⁽²⁾. Upon the full consideration of these judgments, it appears to me that they do not govern the present case. The existence of a parol promise to consent to the transfer of the incumbrance, was there [191] *the circumstance relied upon to save the application of the rule in *Flureau v. Thornhill* ⁽¹⁾, whereas in the present case, so far from the existence at the time of the contract in 1867 of any promise on the part of the lessors to consent to a sale by the defendants to the plaintiffs, all the facts stated

⁽¹⁾ 2 W. Bl., 1078.

⁽²⁾ 6 B. & C., 81.

⁽³⁾ 1 Ex., 850.

⁽⁴⁾ 4 B. & S., 423.

in the case, especially the notice in October, 1865, seem to me to show that there was no reason for assuming such consent. Moreover it is impossible to deny that the authority of *Sikes v. Wild*⁽¹⁾, as applicable to any other case not identical in its facts, is much weakened by the forcible judgment of the Lord Chief Justice in the court below, in favor of the plaintiff. After commenting on the rule in *Flureau v. Thornhill*⁽²⁾, and the reasons upon which it is founded, he adds, "But I can see no reason, in the absence of authority, for extending the exception to parties, who, *knowing* that they have not any present estate to convey, *take upon themselves to sell in the speculative belief that they will be able to procure an interest and title before they are called upon to execute the conveyance.* There is an obvious difference between an owner, who knows that he alone is entitled to an estate and has a right to sell it, although he may fail to make out a sufficient title, and the person who not having the estate takes upon him to sell on the expectation of acquiring the estate in time and making out a title." Even if the majority of the court in that case, and the jury by their finding, were right in holding that there was there a reasonable expectation, as distinguished from a speculative belief, I can see nothing of the kind in the present case, which therefore, in my opinion, is not affected by the case of *Sikes v. Wild*⁽¹⁾, even assuming that case to have been correctly decided. The present case was not argued in the Exchequer Chamber in consequence of an understanding between counsel that the case of *Engel v. Fitch*⁽³⁾ bore so closely upon it that it was desirable to proceed at once to your lordships' House after a formal judgment for the defendants, in order that the whole subject might be freely discussed. Upon a careful perusal of the case of *Engel v. Fitch*⁽³⁾, I am unable to perceive that it bears so closely upon the present case as appears to have been supposed at that time. Both in the Queen's Bench and in the Court of Error, *the case was decided upon the ground that the [192 breach of contract having arisen from the *neglect* of the defendants to do an act within their power, in order to complete the title, and not from *inability* to make a title, *Flureau v. Thornhill*⁽²⁾ did not apply. In the present case I do not think that the facts show that the defendants were in a position, even if they had so chosen, to get over the difficulty which existed, but on the contrary that it was a matter wholly beyond their control. The case, however, is

(1) 1 B. & S., 587; 4 Ibid., 421.

(2) 2 W. Bl., 1078.

(3) Law Rep., 3 Q. B., 814; in error, 4 Ibid., 659.

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of great value, as showing beyond all question that the rule in *Flureau v. Thornhill*⁽¹⁾ is a rule wholly confined to cases of *inability* to make a title, and not to breaches of contract *in respect of the sale of real property* from whatsoever cause arising. Lord Chief Baron Kelly in *Engel v. Fitch*⁽²⁾ speaks, as I venture to think, with correctness, of the rule as a "qualification of the rule of common law, founded entirely on the difficulty that a vendor finds in making a title to real estate not from any default on his part, but from his ignorance of the strict legal state of his title."

I come now to consider the judgments of the learned barons of the Exchequer in the present case. Those judgments were delivered without time taken to consider, and they are not all founded upon the same grounds. Mr. Baron Martin passes over what I feel to be the main difficulty in the defendants' way by the observation "the defendants were willing to complete their contract, and only failed because they failed to get the consent which they might reasonably have supposed there would be no difficulty in getting." It appears to me, on the contrary, that, under the circumstances of the case, there was nothing to justify them in making such a contract with the knowledge they possessed, without communicating the present defect of their title to the intending purchaser, and certainly nothing to justify them in assuming that that defect would be cured. The judgment of Mr. Baron Channell seems to proceed upon the supposition that the rule in *Flureau v. Thornhill*⁽¹⁾ applies wherever *fraud* is not suggested, for which position he says that *Pounsett v. Fuller*⁽³⁾ and *Sikes v. Wild*⁽⁴⁾ seem to be strong authorities. To this [193] I do not assent, for the reasons explained above. Mr. Baron Cleasby proceeds on a wholly different ground from his learned brethren, and bases his decision on the ground that the defendants having merely contracted to sell "their interest" had in fact only sold their interest, such as it was, in a contract relative to the property, and not any legal interest whatever. But, as pointed out by Mr. Baron Martin in his judgment, this view of the case, if correct, would show that the defendants were not liable for any breach of contract at all, a point never suggested on their behalf, and I think it plain that the meaning of the contract cannot be so restricted. The very words "We offer to sell you our interest," must, I think, be construed as an offer to sell something which they had an unrestricted right to sell, and the subsequent words as to payment of £2,500, "to be

(1) 2 W. Bl., 1078.

(2) Law Rep., 4 Q. B., 666.

(3) 17 C. B., 660.

(4) 1 B. & S., 587; 4 Ibid., 421.

paid in cash on *our handing you a transfer of the said royalty.*" are, in my opinion, quite inconsistent with the supposition that both parties could be held to have contracted deliberately upon any other basis than that the defendants had an absolute right to convey, subject only to unanticipated difficulties in making out the titles.

For these reasons I am of opinion that the rule in *Flureau v. Thornhill* (') is not applicable to the present case, and that the plaintiffs are entitled to such damages for the loss of their bargain as the arbitrator appointed may assess.

Mr. BARON FIGOTT: In answer to the questions submitted by your lordships to the judges, I am of opinion, first, that upon a contract for the sale of real estate where the vendor, *without his default*, is unable to make a good title, the purchaser is not by law entitled to recover *damages for the loss of his bargain*.

Secondly, that the actual possession of the property, the subject of the contract, is not *essential* to bring the case within the rule laid down in *Flureau v. Thornhill* ('). And, lastly, that the circumstances of the present case do not distinguish it from the case of *Flureau v. Thornhill* (').

I base my answers to the first and second questions of your *lordships upon the decision in *Flureau v. Thorn-* [194
hill ('), which is, in my opinion, both good law and good sense. I think that it would have been impolitic and unjust to allow damages to be recovered in such a case for the loss of the bargain.

The court considered it an exceptional case, taking it out of the ordinary rule as to damages, but confining the exception to cases where (to use the words of the Chief Justice) "*without fraud*," a vendor was incapable of making a good title to real estate. If the vendor by his own default had caused the breach, that would be, I conceive, in the nature of a fraud upon the vendee, and would disentitle the former to the benefit of the exception.

The reasons for such an exception seem both evident and cogent. No man, not a lawyer, could, from the difficulty of the subject know, in the majority of cases, the state of his title to land, and this was well known to both vendors and purchasers; hence Blackstone, J., said, "these contracts are upon condition that the vendor has a good title," implying that it was at that time a well understood term of such contracts within the contemplation of all parties. Without such a term being implied every man must have expressed it in his contract, or have incurred beforehand an expensive

(') 2 W. BL., 1078.

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investigation of his title; or another very probable result would have been that such contracts would be unduly discouraged by the fear of consequences which vendors could not foresee. Such being the circumstances under which these contracts were entered into, it was, in my opinion, highly reasonable that the court should infer that the parties contracted with reference to them, and that the damages for a breach should be assessed upon the principle thus contemplated by both. I submit also that the rule was intended to be a broad and plain one, making no distinction, and calling for none, whether the vendor was at the time of his contract in possession or not.

The case thus decided one hundred years ago, has been, with very slight exceptions, acted upon ever since. Its soundness has been generally admitted and approved, and it must be taken, I think, that all subsequent contracts for [195] the sale of real estates have *proceeded upon the law thus established. Perhaps many such contracts may be now in existence, and it would not only be hard to apply to them an *ex post facto* law, but, I venture to think, that only the most irresistible reasons should induce your lordships to disturb that decision.

In the year 1826, *Hopkins v. Grazebrook* (¹) seems to have cast some disparagement upon *Flureau v. Thornhill* (²), but that case went in the result no farther than to engraft an exception upon it.

The facts were that the defendant had put up for sale part of an estate which belonged to one Hill. Hill had contracted for the sale of it to Harwood, and defendant had contracted to purchase the same from Harwood. The case only states that "a misunderstanding arose between Hill and Harwood," and the conveyance to the latter was never executed. In consequence of this dispute, defendant (who acted *bona fide* throughout) was unable to complete his contract, and was sued for the breach of it. It is not very clearly to be collected from the case what the dispute was about; but assuming, as I do from the argument and judgments, that it was upon defective title, I venture humbly to submit that the distinction has no real foundation. The Chief Justice Abbott says, "The defendant unfortunately put the estate up to auction before he got a conveyance;" and Bayley, J., says, "The case of *Flureau v. Thornhill* (²) is very different, for here the vendor had nothing but an equitable title."

But no reason is given why a person may not as properly contract for the sale of an estate to which he is entitled in

(¹) 6 B. & C., 31.

(²) 2 W. Bl., 1078.

equity as well as in law. He is (*ex hypothesi*) entitled to the thing he contracts to sell (which is the estate), and he is bound to perform his contract. The contract does not express, nor necessarily assume, that he is actually in possession of the estate, or anything more than that he is so far entitled to possession that he will be able to give it at the proper time to his vendee, nor does it assume that he has had it conveyed in law to him. It is a contract to convey and give possession within the time fixed, or within a reasonable time, subject to the implied condition that *the [196 title be not objected to by the purchaser. If this be the whole effect of the contract, there seems to be no ground for saying, as the Chief Justice did, "that he was bound to have had a conveyance before he put it up to auction;" or in the language of Bayley, J., that "the purchaser might presume that he had had a satisfactory title, and if he had not, that he may very fairly be compelled to pay the loss which the purchaser sustains by not having that for which he contracted." But a reason altogether different from these is ascribed for this decision of Chief Justice Abbott in the judgment of *Sikes v. Wild* (¹), viz., that the Chief Justice thought it illegal and against public policy to contract to sell things of which the vendor was not in possession. I need not say this is a ground hardly tenable to the present day. I must, however, refer your lordships to the judgment of the Court of Queen's Bench in the case of *Engel v. Fitch* (²) in 1868, with reference to *Hopkins v. Grazebrook* (³). The Lord Chief Justice certainly says, "It stands upon a perfectly intelligible and sound foundation;" and he adds "there is an obvious difference between the case of a man who, being in possession and the undoubted owner of real property, is unable to make out a marketable title, and that of one who not being the owner, but having only a contract for the purchase, takes upon himself to sell it to another as his own, and as if the title were his to convey" (&c.) Now, with great respect to so high an authority, it seems to me that the alternatives here presented come to very much the same result; viz., who is the owner of the estate, and as such entitled by law to deal with it in contract?

The vendor has ceased to have the power of disposing of it, while the vendee may have good reason to believe that the title is unobjectionable, and that he can with perfect *bona fides* offer it for sale. Why may he not do so? It is difficult to see; for if he were in possession his title may

(¹) 1 B. & S., 587.

(²) Law Rep., 3 Q. B., 314; in error, 4 Ibid., 659.

(³) 6 B. & C., 31.

prove defective, and it is only an equal chance that it may prove so where he is entitled to possession by contract.

In *Walker v. Moore* (¹), Littledale, J., said, "When a [197] contract *for the purchase of lands is made, each party cannot but know that the title may prove defective, and must be taken to proceed upon that knowledge;" and Parke, J., says, "in the absence of any express stipulation about it, the parties must be considered as content that the damages in the event of the title proving defective shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain."

I would refer especially to another case in which *Flureau v. Thornhill* (²) was followed, viz., *Pounsett v. Fuller* (³). It differed in its circumstances in this important particular, that there the defendant had only an agreement in writing but not under seal, for a right of shooting over a manor for four years. He contracted to sell this right to the plaintiff (together with a furnished cottage which does not seem to have been held under the agreement with the shooting). But in consequence of the objection of his lessor the defendant was unable to complete his contract for the shooting. The court said that it fell within the decisions of *Flureau v. Thornhill* (²) and *Walker v. Moore* (¹), because the defendant was not to blame, and the judgment of Chief Justice Jervis goes on to say, "though legally and technically he had not acquired a right to sell what he professed to sell to the plaintiff since he had no agreement under seal, still he, as a layman, might fairly believe that as he had signed a written agreement he had a right to sell, and was therefore not to blame for entering into a contract to sell." Mr. Justice Cresswell indeed assumes that the defendant was in possession of the shooting; but the judgment of Mr. Justice Williams, whilst it goes farther in the expressions of approbation of *Flureau v. Thornhill* (²), as laying down a rule called for by the position of the parties to such contracts, goes on to say, "Here it is true defendant had nothing but an *equitable title*, but he did not know that he had not a *perfectly good title*."

This was followed by the case of *Sikes v. Wild* (⁴) in the Queen's Bench, to the same effect; and that case was affirmed on error.

The defendants were devisees under the will of E. upon trust [198] to *sell the land, and to pay out of the interest of the

(¹) 10 B. & C., 422.

(²) 2 W. Bl., 1078.

(³) 17 C. B., 660.

(⁴) 1 B. & S., 587; in error, 4 Ibid., 421.

proceeds £100 per annum to his wife. The estate was held subject to a settlement by which *the legal estate was in trustees* for securing that sum to her. The defendants offered the land for sale, believing that the wife would, in accordance with advice, concur in the conveyance of the land free from incumbrance. After sale and a deposit paid she refused to concur, and the plaintiff claimed damages for the loss of his bargain. In the Court of Queen's Bench Justices Wightman and Blackburn held that it came within the rule of *Flureau v. Thornhill* ⁽¹⁾, and their judgment was affirmed by the Exchequer Chamber. The Lord Chief Justice Cockburn in the court below, held that it came within the exception engrafted upon it by *Hopkins v. Grazebrook* ⁽²⁾, but the whole of the judges in both courts, nine in number, approved of the rule in *Flureau v. Thornhill* ⁽³⁾.

I beg leave to refer your lordships to the judgment delivered by Mr. Justice Blackburn in *Sikes v. Wild* ⁽⁴⁾, both for the very exhaustive review which it takes of the whole of the cases bearing upon this subject, and especially for the observations there made upon *Hopkins v. Grazebrook*, in which I entirely agree. The latter passage is this ⁽⁵⁾, "We think that it will be worthy of the consideration of any court competent to review that case, whether the strong opinion of Lord St. Leonards, reported in his 13th edition of *Vendors and Purchasers*, p. 301, does not show that the general understanding of conveyancers has been misapprehended," and he adds "it is impossible to say, as a matter of law, that there is misconduct in putting up property for sale without describing every material fact, as if it was a case of marine insurance." The case was decided in Trinity Term, 1861; and in the edition of *Vendors and Purchasers* in the following year, the learned author in his commentary upon the decision writes thus, "This seems to be the true rule; it is a point which, whilst at the bar, I should have treated as beyond doubt." Upon these authorities, and for these reasons, I submit that both the first and second questions of your lordships should be answered in the affirmative in point of law.

*The third question of your lordships depends upon [199 the facts, which are, that Anthony Hill was possessed of a mine called Walter's Royalty, by virtue of an agreement dated the 19th of October, 1861, for a term of twenty-one years. The agreement contained a clause against assignment or subletting without the consent of the lessors in

⁽¹⁾ 2 W. Bl., 1078.

⁽²⁾ 6 B. & C., 31.

⁽³⁾ 1 B. & S., 587; in error, 4 Ibid., 421.

⁽⁴⁾ 1 B. & S., 594, 595.

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writing first had. Anthony Hill died on the 2d of August, 1862, his executors in August, 1863, contracted with defendants for the sale to them of (*inter alia*) Miss Walter's Royalty.

This purchase had not been completed on the 17th of October, 1867. The executors applied to the lessors for, and they were willing to give, consent to the above assignment, provided the defendants would execute a duplicate of it. A consent in writing was accordingly prepared in duplicate, and on the 16th of June, 1865, one part was executed by the lessors, and retained in the hands of their solicitor. The other part was sent on the 15th of June, 1865, to Messrs. Upton & Co., the solicitors for the executors, in order that they might obtain the signature of the defendants, and then exchange it for the one executed by the lessors. The duplicate was about that time sent by Messrs. Upton to defendants' solicitors for execution by the defendants. On two or three occasions the lessors' solicitors requested the solicitors of the executors to obtain the execution by the defendants of this duplicate, and about the 11th of October, 1865, intimated that the lessors would withdraw their consent unless the duplicate was returned executed in a few days. The solicitors of the executors wrote on the 11th of October to the solicitors of the defendants a letter.

The duplicate remained unexecuted in the hands of defendants' solicitors on the 17th of October, 1867, when the agreement now in question was entered into. On that morning one of the plaintiffs saw the defendant Fothergill, with the view to purchase Miss Walter's Royalty; they discussed terms and entered into the agreement on that date, the 17th of October, 1867.

Before the 17th of October, Mr. Fothergill had been told that it would be necessary to obtain the consent of the lessors for the assignment to third parties of the defendants' interest in the royalty, and no mention was made by him to Mr. Paterson of the necessity for such consent. The case [200] states as a reason for this * "either it did not cross his mind, or if it did occur to him, he forbore to mention it, feeling sure that no difficulty would arise with respect to such consent, and that it was, therefore, a matter of no importance."

In the result, after every endeavor had been made to induce the lessors to give their consent to the assignment, their consent was finally refused, and the defendants were, therefore, unable to complete their contract with the plaintiffs. From these statements I infer that the defendants

acted *bona fide* in making the contract with the plaintiffs, that they had an equitable title to the mine at the time, and that they were prevented from carrying out the completion of the contract without any fraud or default (in the nature of misconduct) on their part, but in consequence solely of a defect in their title, which they had not the power to cure. The utmost that can be urged against them is a knowledge that they required the consent of the lessor, which they did not communicate, but there is no pretence for saying that they knew or thought that they were not sure to obtain it. As they honestly believed that they should get it at the time when they sold, it seems to me to be conclusive of the case.

Upon the whole, therefore, I beg to state it as my opinion that the exception as to damages which was established by *Flureau v. Thornhill* (') applies to the present case.

June 22, 1874. LORD CHELMSFORD: My lords, this appeal brings in review before your lordships the case of *Flureau v. Thornhill* (') and other cases which have engrafted exceptions upon it; and the first question to be considered is whether that case was rightly decided. The decision took place very nearly a century ago, in the year 1775, and has been followed ever since; not, however, without an occasional expression of doubt as to its soundness. Should your lordships happen to share in this doubt, you would be extremely reluctant to disturb the rule which it laid down for the assessment of damages upon contracts for the sale of real estates, and which has been so long acted upon, unless you were clearly convinced that it is erroneous and ought no longer to be maintained.

*Now, the rule established by *Flureau v. Thornhill* (') is, that upon a contract for the purchase of a real estate, if the vendor, without fraud, is incapable of making a good title, the intended purchaser is not entitled to any compensation for the loss of his bargain. The case is very shortly reported. Lord Chief Justice De Grey merely laid down the rule, without giving any reason for it. But Mr. Justice Blackstone said this: "These contracts are merely upon condition frequently expressed, but always implied, that the vendor has a good title."

The rule and the reason for it have been adopted and followed in subsequent cases. In *Walker v. Moore* (°), where the plaintiff contracted with the defendant for the purchase of a real estate; the vendor, acting *bona fide*, delivered an abstract showing a good title, and the plaintiff, before he compared it with the original deeds, contracted to sell several

(') 2 W. Bl., 1078.

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(°) 10 B. & C., 416.

portions of the property at a considerable profit. Upon an examination of the abstract with the deeds it was found that the title was defective. The plaintiff refused to complete his purchase, and brought his action claiming, amongst other damages, the profit that would have accrued to him from the resale of the property. It was held that he was not entitled to these damages. Mr. Justice Parke said: "A jury ought not, in the case of a vendor in possession, to give any other damages in consequence of a defect being found in the title, than those which were allowed in *Flureau v. Thornhill* (¹), which was recognized in *Johnson v. Johnson* (²), *Bratt v. Ellis* (³), and *Jones v. Dyke* (⁴). In the absence of any express stipulation about it, the parties must be considered as content that the damages in the event of the title proving defective shall be measured in the ordinary way, and that excludes the claim of damages on account of the supposed goodness of the bargain."

The same learned judge recognized the authority of *Flureau v. Thornhill* (¹) in the case of *Robinson v. Harman* (⁵). He there said: "The case of *Flureau v. Thornhill* (¹) qualified the rule of the common law that where a party sustains [202] a loss by reason of a *breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed." Again, in *Pounsett v. Fuller* (⁶), the court, following the rule in *Flureau v. Thornhill* (¹), held that where a vendor failed to make a good title pursuant to his contract, the purchaser (in the absence of fraud or misrepresentation on the part of the vendor) was not entitled to damages for the loss of his bargain. Mr. Justice Cresswell, in delivering his opinion, said: "We are not called upon here to investigate the grounds upon which the decision in *Flureau v. Thornhill* (¹) proceeded, or to pronounce any opinion as to the wisdom or the expediency of the rule there laid down. It is enough for us to say that it has been received and acted upon in too many subsequent cases to allow us now to call it in question." And in the recent case of *Sikes v. Wild*, the Court of Queen's Bench (⁷) and the Court of Exchequer Chamber (⁸) adopted the rule and acted upon it.

In a more recent case of *Engel v. Fitch* (⁹), to which I shall presently have occasion more particularly to refer, Lord Chief Justice Cockburn, in an elaborate judgment, expressed

(¹) 2 W. Bl., 1078.

(²) 3 B. & P., 162.

(³) Sugd. V. & P., 11th ed., Ap., No. 4.

(⁴) Ibid., No. 5.

(⁵) 1 Ex., 855.

(⁶) 17 C. B., 660.

(⁷) 1 B. & S., 587.

(⁸) 4 B. & S., 421.

(⁹) Law Rep., 3 Q. B., 314; in error, 4 Ibid., 659.

his opinion that the case of *Flureau v. Thornhill* ⁽¹⁾ was unsatisfactory, and gave his sanction to Lord Chief Justice Abbott's doubt as to the soundness of the decision in that case.

There is, perhaps, some difficulty in ascertaining the exact grounds of the judgment in *Flureau v. Thornhill* ⁽¹⁾; but, in addition to those which have been previously assigned, it seems to me that the following considerations may be suggested as in some degree supporting the correctness of the decision: "The fancied goodness of the bargain" must be a matter of a purely speculative character, and in most cases would probably be very difficult to determine, in consequence of the conflicting opinions likely to be formed upon the subject; and even if it could be proved to have been a beneficial purchase, the loss of the pecuniary advantage to be derived from a resale appears to me to be a consequence too remote from the breach of the contract. I am aware that in *Engel v. Fitch* ⁽²⁾, where, after the contract and before the breach *of it, the purchaser contracted for a [203 resale at an advance of £105, the Court of Queen's Bench and the Court of Exchequer Chamber, though pressed with the decision in *Hadley v. Baxendale* ⁽³⁾, held that "if an increase in value has taken place between the contract and the breach, such an increase may be taken to have been in the contemplation of the parties within the meaning of that case." But it must be borne in mind that this question as to damages depends, as Baron Alderson said in *Hadley v. Baxendale* ⁽³⁾, upon what "may reasonably be supposed to have been in the contemplation of *both* parties at the time they made the contract as the probable result of the breach of it." Now, although the purchaser in *Engel v. Fitch* ⁽²⁾, when he entered into the contract, may have contemplated a resale at an advance, it is not at all likely that the loss of this profit should have occurred to the vendor as the probable result of the breach of his contract. The judges were no doubt influenced by the fact of the profitable resale having actually taken place, and were, in consequence, drawn aside from considering what must have been in the minds of both parties at the precise time when they made the contract.

The decision in *Flureau v. Thornhill* ⁽¹⁾ derives great additional authority from the opinion of Lord St. Leonards, who, in his work on the Law of Vendors and Purchasers, ⁽⁴⁾, considers that it was rightly decided.

⁽¹⁾ 2 W. Bl., 1078.

⁽²⁾ 9 Ex., 341.

⁽³⁾ Law Rep., 3 Q. B., 314; in error,

⁽⁴⁾ 14th ed., p. 360.

4 Ibid., 650.

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The almost unanimous approval of the decision in *Flureau v. Thornhill* (1) was broken in upon by an expression of disapprobation from Chief Justice Abbott in the case of *Hopkins v. Grazebrook* (2), to which I have already alluded. He there said: "Upon the present occasion I will only say, that if it is advanced as a general proposition that where a vendor cannot make a good title the purchaser shall recover nothing more than nominal damages, I am by no means prepared to assent to it. If it were necessary to decide that point I should desire to have time for consideration." As the case of *Hopkins v. Grazebrook* (2) was one which, according to the opinion of the court, was not within the operation of the rule in *Flureau v. Thornhill* (1), there was no occasion for this *passing reflection upon that case, which had been then silently acquiesced in for fifty years.

In *Hopkins v. Grazebrook* (2), a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him, and it was held that a purchaser of certain lots at the auction might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages which he sustained by not having the contract carried into effect. Chief Justice Abbott said: "The defendant had unfortunately put the estate up to auction before he got a conveyance. He should not have taken such a step without ascertaining that he would be in a situation to offer some title, and having entered into a contract to sell without the power to confer even the shadow of a title, I think he must be responsible for the damage sustained by a breach of his contract." And Justice Bayley said: "The case of *Flureau v. Thornhill* (1) is very different from this, for here the vendor had nothing but an equitable title."

The decision itself in *Hopkins v. Grazebrook* (2) cannot be supported. The seller in that case had undoubtedly an equitable estate in respect of which he had a right to contract. Therefore the language of Chief Justice Abbott, that "the defendant had entered into a contract to sell without the power to confer even the shadow of a title," is not warranted by the circumstances of the case, as the defendant could certainly have assigned his equitable estate; and thus the sole ground upon which he held him responsible for damages entirely failed. But although the facts in *Hopkins v. Grazebrook* (2) did not justify the decision, yet the

(1) 2 W. Bl., 1078.

(2) 6 B. & C., 31.

case has always been treated as having introduced an exception to the rule in *Flureau v. Thornhill* ⁽¹⁾, and as having withdrawn from its operation a class of cases where a person, knowing that he has no title to real estate, enters into a contract for the sale of it. It is not correct to say with Lord *St. Leonards* in his *Vendors and Purchasers* ⁽²⁾, that *Hopkins v. Grazebrook* ⁽³⁾ has *not been followed. It has [205 been recognized in several cases since, and in one to which I shall presently refer it has been expressly followed. In *Robinson v. Harman* ⁽⁴⁾, already mentioned as having sanctioned the decision in *Flureau v. Thornhill* ⁽¹⁾, Baron Parke said: "The present case comes within the rule of the common law, and I cannot distinguish it from *Hopkins v. Grazebrook*" ⁽⁵⁾. And Baron Alderson and Baron Platt expressed the same opinion. In *Pounsett v. Fuller* ⁽⁶⁾, *Hopkins v. Grazebrook* ⁽⁷⁾ was treated as a valid authority by all the judges, the question which they considered being whether the case fell within *Flureau v. Thornhill* ⁽¹⁾, or the exception in *Hopkins v. Grazebrook* ⁽³⁾, and they decided that it was within the former case.

But in the case of *Engel v. Fitch* the Court of Queen's Bench ⁽⁸⁾, and afterwards the Exchequer Chamber ⁽⁹⁾, proceeded expressly on the cases of *Hopkins v. Grazebrook* ⁽³⁾ and *Robinson v. Harman* ⁽⁴⁾, the Chief Baron, quoting the very words of the Lord Chief Justice, and relying on those cases. In that case the mortgagees of a house sold it by auction to the plaintiff, the particulars of sale stating that possession would be given on completion of the purchase. The purchaser resold the house at an advance in the price to a person who wanted it for immediate occupation. The mortgagor refused to give up the possession. The mortgagee could have ousted him by ejectment, but refused to do so on the ground of the expense. The purchaser brought an action upon the contract of sale, and it was held, that as the breach of contract arose not from inability of the defendants to make a good title, but from their refusal to take the necessary steps to give the plaintiff possession pursuant to the contract, he could recover not only the deposit and the expenses of investigating the title, but damages for the loss of his bargain; and that the measure of such damages was the profit which it was shown he would have made upon a resale. It was after this decision in *Engel v. Fitch* that the plaintiffs in error declined to argue the present case in the

⁽¹⁾ 2 W. Bl., 1078.

⁽²⁾ 14th ed., p. 359.

⁽³⁾ 6 B. & C., 31.

⁽⁴⁾ 1 Ex., 850.

⁽⁵⁾ 17 C. B., 660.

⁽⁶⁾ Law Rep., 3 Q. B., 814.

⁽⁷⁾ Law Rep., 4 Q. B., 659, 664.

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Exchequer Chamber, as the authorities on the subject could 206] only be freely reviewed by a higher tribunal. *The case therefore comes to your lordships' house without the advantage of the opinions of the learned judges of that court.

Notwithstanding the repeated recognition of the authority of *Hopkins v. Grazebrook* ⁽¹⁾, I cannot, after careful consideration, acquiesce in the propriety of that decision. I speak, of course, of the exception which it introduced to the rule established by *Flureau v. Thornhill* ⁽²⁾, with respect to damages upon the breach of a contract for the sale of a real estate, for as to the case itself not falling within the exception to the rule (if any such exists), I suppose no doubt can now be entertained. The exception which the court, in *Hopkins v. Grazebrook* ⁽¹⁾, engrafted upon the rule in *Flureau v. Thornhill* ⁽²⁾, has always been taken to be this: that in an action for breach of a contract for the sale of a real estate if the vendor at the time of entering into the contract knew that he had no title, the purchaser has a right to recover damages for the loss of his bargain.

In *Sedgwick on Damages* ⁽³⁾, mentioned by Mr. Baron Martin, in his judgment in this case, after the reference to the general rule as to damages, it is said, "To this general rule there undoubtedly exists an important exception which has been introduced from the civil law in regard to damages recoverable against a vendor of real estate who fails to perform and complete the title. In these cases the line has been repeatedly drawn between parties acting in good faith and failing to perform because they could not make a title, and parties whose conduct is tainted with fraud and bad faith. In the former case, the plaintiff can only recover whatever money has been paid by him with interest and expenses. In the latter, he is entitled to damages for the loss of his bargain. The exception cannot, I think, be justified or explained on principle, but it is well settled in practice." I quite agree that the distinction as to damages in cases of contracts for the sale of real estate, where the vendor acts *bona fide*, and where his conduct is tainted with fraud or bad faith, is not to be "justified or explained on principle."

I fully agree in the doubt expressed by Mr. Justice Blackburn, in *Sikes v. Wild* ⁽⁴⁾, as to the soundness of the 207] exception in **Hopkins v. Grazebrook* ⁽¹⁾, and in the observations which follow the expression of that doubt. The learned judge said, "I do not see how the existence of misconduct can alter the rule by which damages for the

⁽¹⁾ 6 B. & C., 31.

⁽²⁾ 2 W. Bl., 1078.

⁽³⁾ 4th ed., p. 234.

⁽⁴⁾ 1 B. & S., 594.

breach of a contract are to be assessed, it may render the contract voidable on the ground of fraud, or give a cause of action for deceit, but surely it cannot alter the effect of the contract itself. And if it be said that the rule depends upon an implied condition resulting from the general understanding of vendors and purchasers (which is the ground taken by Mr. Justice Parke in *Walker v. Moore* ⁽¹⁾), and I think the true one), and that the usage is such that this implied condition excludes such cases as *Hopkins v. Grazebrook* ⁽²⁾, I think that it will be worthy of the consideration of any court competent to review that case whether the strong opinion of Lord St. Leonards, repeated in the 13th edition of *Vendors and Purchasers*, does not show that the "general understanding of conveyancers has been misapprehended." In the 14th edition of his work ⁽³⁾, Lord St. Leonards quotes the whole of the above passage from Mr. Justice Blackburn's judgment, and adds, "this seems to be the true rule, it is a point which, whilst at the bar, I should have treated as beyond doubt."

Upon a review of all the decisions on the subject, I think that the case of *Hopkins v. Grazebrook* ⁽⁴⁾ ought not any longer to be regarded as an authority. Entertaining this opinion, I can have no doubt that the judgment of the Court of Exchequer in the present case is right, whether it falls within the rule as established by *Flureau v. Thornhill* ⁽⁵⁾, or is to be considered as involving circumstances which have been regarded as removing cases from the influence of that rule; because I think the rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of a real estate must be taken to be without exception. If a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit.

*It is only necessary to add that, in my opinion, if [208 there were any exceptional cases from the rule in *Flureau v. Thornhill* ⁽⁶⁾, the present case would not fall within any of them, but is within the rule itself. The respondents, when they entered into the contract for the sale of Miss Walter's Royalty, had an equitable title to the mine which they might have perfected by obtaining the lessors' consent to the assignment to them. This consent had not been ob-

⁽¹⁾ 10 B. & C., 416.

⁽²⁾ 6 B. & C., 31.

⁽³⁾ Pages 360, 361.

⁽⁴⁾ 2 W. Bl., 1078.

tained at the time the contract was entered into, and the fact was not communicated to the intended purchaser. The reason for this non-communication is stated in the case to be, that "either it did not cross the mind of the respondent Fothergill, or, if it did occur to him he forbore to mention it, feeling sure that no difficulty would arise with respect to such consent, and that it was therefore a matter of no importance." There is no reason to think that the respondents were not acting throughout under a *bona fide* belief that the lessors' consent might be obtained at any time upon application. They were prevented performing their contract, not from any fraud or wilful act on their part, but by an unexpected defect in their title which it was beyond their power to cure.

The case falls precisely within the terms of the rule as stated in *Flureau v. Thornhill* ('); and therefore, in my opinion, the judgment appealed from is right and ought to be affirmed.

LORD HATHERLEY: My lords, I entirely concur in the view which has been expressed by my noble and learned friend who has just addressed your lordships.

If the question in this case depends entirely upon the case of *Flureau v. Thornhill* ('), it can scarcely, in my judgment, after the lapse of time which has taken place since that decision, be argued at your lordships' bar. I certainly remember myself, now more than fifty years ago, when I was reading in Chambers, to have heard that it was considered as a settled rule that no damages could be recovered for a loss of the benefit of a bargain in case a good title could not be made out by a vendor to his purchaser. That was then considered as settled by the decision in *Flureau v. Thornhill* ('), which had taken place forty-nine years before 209] that *time; that would make it altogether ninety-nine years from the present time. Therefore, my lords, for ninety-nine years the rule has prevailed as settled by *Flureau v. Thornhill* ('), and it has affected and governed, I may say, thousands and thousands of transactions annually, for undoubtedly the contracts for the sale of real estate may be reckoned by thousands annually, and nobody, I apprehend, has as yet ever contradicted it. Whatever may have been the expressions of dissatisfaction that have been uttered with regard to that decision, nobody has come to the conclusion that the rule as established in *Flureau v. Thornhill* ('') should be overthrown. Now, my lords, upon a much less extensive series of practice by conveyancers, your lord-

(') 2 W. BL, 1078.

ships' House has been in the habit of acting; but in this case there is not merely the practice of conveyancers, but the common dealings of mankind, which, continuing year after year, as I have said, in many thousands of cases, have required the practice to be put into effect. As far, therefore, as this case falls within the rule in *Flureau v. Thornhill* ⁽¹⁾ it must be considered as one beyond all doubt.

As regards the case of *Engel v. Fitch* ⁽²⁾ (I do not speak for the moment with regard to the case of *Hopkins v. Grazebrook* ⁽³⁾), that certainly was a very peculiar case, whether the course taken by the court was correct or not in the decision upon the point of damages arising in consequence of the loss of the benefit of the contract. The vendor in that case was bound by his contract, as every vendor is bound by his contract, to do all that he could to complete the conveyance. Whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance. In *Engel v. Fitch* ⁽²⁾ a man having sold his estate, but having failed to do everything in his power to compel possession of the estate to be given up, and being in a condition in which, if a bill had been filed in equity, he would have been compelled by the court to take proceedings in order to obtain the delivery up of possession according to his contract with his vendee, he refused to take any such proceedings *whatever sim- [210
ply upon the ground of the expense it might entail on him. There could be no doubt whatever in that case that he was acting in gross violation of his contract which he had the power of performing. Whether or not the proper mode of correcting that abuse was by giving damages to the plaintiff in respect of the loss of his contract, I will not stop to inquire. But it is quite clear that that case was exceedingly different from the case of *Flureau v. Thornhill* ⁽¹⁾, where it turned out on investigation that the vendor had no legal title.

The reasons given for the judgment in *Flureau v. Thornhill* ⁽¹⁾ were certainly not altogether satisfactory, because the Lord Chief Justice is said upon that occasion to have stated *simpliciter*, without alleging any ground whatever for the decision, that upon a contract for a purchase, if the title proves bad and the vendor is (without fraud) incapable of making a good one, the purchaser is not entitled to any

⁽¹⁾ 2 W. BL., 1078.

⁽²⁾ Law Rep., 3 Q. B., 314; in error, 4 Ibid., 659.

⁽³⁾ 6 B. & C., 31.

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damages for the fancied goodness of the bargain; to which Mr. Justice Blackstone added that "these contracts are merely upon a condition frequently expressed, but always implied, that the vendor has a good title." That is scarcely a correct representation of the case, because if the vendor's contract with his vendee was on the condition that he had a good title, then in the event of the title failing, there would be no action for damages whatever, and there would be no power in the vendee to do that which he is always entitled in equity to do, namely, to insist upon having the title good or bad, if he should be so minded; if the title is defective, and if it is so stated, the vendee is always allowed to have the benefit of the contract.

Therefore the reason is not that the contract is made upon that condition, but the foundation of the rule has been already more clearly expressed by my noble and learned friend who has preceded me in saying that, having regard to the very nature of this transaction in the dealings of mankind in the purchase and sale of real estates, it is recognized on all hands that the purchaser knows on his part that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor; and taking the property with that knowledge, he is not to be held entitled to recover any loss [211] *on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title. All that he is entitled to is the expense he may have been put to in investigating that matter. He has a right also to take the estate and complete the purchase with that defective title if he thinks proper so to do, but he is held to have bargained with the vendor upon the footing that he (the vendee) shall not be entitled, under all circumstances, to have that contract completed, and therefore he is not put in a position under such a contract to make a resale before the matter has been fully investigated, and before it is ascertained whether or not the title of his vendor is a good one.

A contract for a sale of real estate is very different indeed from a contract for a sale of a chattel, where the vendor must know what his right to the chattel is, or at all events is taken to know what his right to the chattel is. And, farther, in the case of chattels, we well know, as regards the larger part of those contracts at least, that the chattels are purchased with a view to resale, and therefore the whole transaction between the two parties is upon the footing and upon the faith, that all the expense or loss that may

be incurred, whether it be by the vendee being put to the expense of making any inquiry upon the subject, or whether it be by a loss of profit which he might have obtained if the chattel had been delivered to him, is within the contemplation of both parties, and that is therefore assumed to be the actual contract which the vendor wished to enter into.

The only question therefore really remaining in the case, assuming that your lordships will not think it right to act contrary to the practice which has prevailed ever since the decision of *Flureau v. Thornhill*⁽¹⁾, is, whether or not the present case can be distinguished in any way from that decision. It appears to me, my lords, that there is nothing whatever in the case to distinguish it. The contract was made *bona fide* (there is no allegation to the contrary) by the vendor, in the genuine belief that he had a good title. The circumstance that there had been some litigation before as between him and his original lessors, from whom he derived the lease which he sold, as to whether or not they *would give their consent to an assignment, is not, as [212 it appears to me, a circumstance which necessarily implies that there was any want of good faith on his part in offering to sell the property, he being in the full belief that his lessors might reasonably assent, and being consequently in the full belief that that assent would be given. Nor, in the case which is suggested as an alternative, of his having forgotten altogether the circumstance of the existence of that necessary ingredient in his title, would the case be at all different from that of any vendor who believed, at any period of the existence of his title, that there was some difficulty existing in it, but forgot that circumstance at the time of his making his bargain; in which case the vendor with a good conscience might be brought within the rule in *Flureau v. Thornhill*⁽¹⁾.

I entirely agree with the comments which my noble and learned friend has made upon the case of *Hopkins v. Grazebrook*⁽²⁾. I think it would be impossible to say, regard being had to the principles upon which the courts have proceeded since the rule in *Flureau v. Thornhill*⁽¹⁾ was laid down, that *Hopkins v. Grazebrook*⁽²⁾ can substantially be distinguished from that case; because in *Hopkins v. Grazebrook*⁽²⁾ the vendor had made a bargain with another person for the purchase of a property which he had every reason to suppose would be conveyed to him within a certain reasonable time. Having made that bargain he made

(1) 2 W. Bl., 1078.

(2) 6 B. & C., 31.

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another contract for the sale of the same property. He was just in the same position as any other vendor having an equitable title transferred to him, who might under those circumstances choose to sell it himself, as the defendant chose in that case to make a sale of that property. The circumstance of his not being in possession, when you look at the complicated law which governs real estate in this country, is not a circumstance which in itself ought at all to lead the court to say that he must have known that he could not complete the title. In a vast number of instances, from a variety of circumstances, the actual vendor may not be immediately in possession, although he may have a right to obtain that possession in a reasonable time, and to compel (as the vendor had a right to do in *Engel v. Fitch* ⁽¹⁾) [213] those who are in possession to hand over *that possession to him. I do not think, therefore, that there is any sound distinction between the case of *Hopkins v. Grazebrook* ⁽²⁾ and that class of authorities which are governed by *Flureau v. Thornhill* ⁽³⁾.

My lords, under these circumstances, I have no hesitation in coming to the conclusion that the decision of the court now appealed from was right and ought to be affirmed.

Judgment of the courts below affirmed.

Lords' Journals, 22d June, 1874.

Attorneys for plaintiffs in error: Messrs. *Helder & Roberts*.

Attorneys for defendants in error: Messrs. *Thomas & Hollams*.

⁽¹⁾ Law Rep., 3 Q. B., 314; in error, 4. Ibid, 659.

⁽²⁾ 6 B. & C., 31.

⁽³⁾ 2 W. Bl., 1078.

If one contract to sell real estate in good faith believing he has good title, and on discovering it to be defective, refuse for that reason to perform, he is liable only for nominal damages. *Pumpelly v. Phelps*, 40 N. Y., 59; *Drake v. Baker*, 34 New Jersey Law Rep., 358; see 1 Alb. Law Jour., 120; 10 Albany Law Jour., 406.

But such rule should be strictly limited to those cases coming wholly and exactly within it. *Pumpelly v. Phelps*, 40 N. Y., 59.

And where a vendor contracts to sell lands, in which he knows he has not title or the power of conveyance, he is bound to make good to the vendee the loss of the bargain through his default. *Pumpelly v. Phelps*, 40 N. Y., 59; *Drake v. Baker*, 34 New Jersey Law Rep., 358; *Lock v. Furze*, L. R.,

1 C. P., 441, S. C. 6 Am. Law Reg., N. S., 45, and note p. 49; see 1 Alb. Law Jour., 120; 10 Albany L. Jour., 406.

Nor in such case does it excuse the vendor that he acted in good faith, and believed, when he entered into the contract, that he should be able to procure a good title for his purchaser. *Pumpelly v. Phelps*, 40 N. Y., 59.

Otherwise in Iowa. *Sawyer v. Warner*, 36 Iowa, 333.

So the vendor is liable for actual damages if having title he refuse to perform. *Engel v. Fitch*, Law Rep. 3 Queen's Bench, 314.

If a lessee be evicted and sue for breach of the covenant for quiet enjoyment, he may recover the value of the unexpired term less the rent reserved. *Mack v. Patchin*, 42 N. Y., 167.

In an action for acts by the landlord

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injuring the tenant's enjoyment of the demised premises, the tenant can only recover his actual damages. *Gallup v. Albany, etc.*, 7 Lansing, 471, affirmed by Commission of Appeals, Jan'y 15, 1875;

see also *Watkins v. Rust*, 2 Lansing, 824. The vendor cannot recover the contract price except in an action for specific performance. *Congregation, etc., v. Central, etc.*, 10 Abb. N. S., 485.

[Law Reports, 7 House of Lords, 213.]

July 4, 1873; May 15, June 22, 1874.

MARIA PATRICIA BRIDGES, Plaintiff in Error, and THE DIRECTORS, &c., OF THE NORTH LONDON RAILWAY COMPANY, Defendants in Error.

Railway—Negligence—Evidence for Jury—Nonsuit.

B. was in the last carriage of a railway train. Before reaching the station at which he was to alight the train had to pass through a tunnel. In that tunnel there was, first, a heap of hard rubbish lying by the side of the rails, irregular in form and height, then a short sloping piece of ground, then a piece of flat platform, like the main platform, but narrower, and within the tunnel. Beyond these was the main platform itself. The train only partially went up to the main platform, leaving the last two carriages within the tunnel, which had no light within it, and on the occasion in question was filled with steam. The last carriage but one came opposite the narrow platform, the last carriage was opposite the hard rubbish. A passenger in the last carriage but one (who was called as a witness at the trial) heard the name of the station called out in the usual way and got out upon the narrow platform. He then heard a groaning, and proceeding farther back into the tunnel found B. lying on the rubbish with his legs between the wheels of the last carriage, but neither of them had touched him. B.'s leg was broken, and he had received other injuries, from the effects of all which he died. The witness heard the warning, "Keep your seats," and shortly afterwards the train moved on.

On these facts the learned judge at the trial held that there was no evidence of negligence to go to the jury, and he directed a nonsuit. Owing to a strong expression of opinion by the jurymen he took their finding (on the assumption that there ought to be a verdict for the plaintiff) as to the amount of damages. The nonsuit was then entered, with leave to move to enter the verdict for the damages assessed:

Held, that the ruling at Nisi Prius could not be sustained; that the case ought not to have been withdrawn from the consideration of the jury, for that the evidence furnished matter on which it was necessary to take the opinion of a jury.

Quere, whether calling out the name of a station is an invitation to the passengers, going to that station, to alight there (!).

ACTION for damages for negligence in causing the death of the plaintiff's husband. Plea not guilty.

The cause was heard before Mr. Justice Blackburn at the Middlesex sittings after Michaelmas Term, 1869.

Mr. Bridges, who resided at Highbury, had been a season ticket holder on this railway for some time, going daily between that place and Broad Street, the city terminus of the railway. He was fifty-two years of age, and very near sighted. On the 20th of January, 1869, he left Broad Street at 6.40 p.m. He was in the last passenger carriage of the

(¹) See *Weller v. The London, Brighton, &c., Railway Company*, Law Rep., 9 C. P., 126; 8 Eng. Rep., 441.

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train, the very last carriage being the guard's compartment. The train arrived at Highbury at a few minutes before 7 o'clock.

The tunnel was filled with steam, the night being damp. The station at Highbury appeared, from the statement in the case prepared for the Exchequer Chamber, to be thus formed: Approaching the station from London there is a tunnel about 150 feet in length; there is a slope, on which was lying a heap of hard rubbish, and then a platform, which is, in fact, a continuation of the station platform, but is narrower, and is within the tunnel. After getting through the tunnel there is the proper station platform. The station is lighted. There is a lamp at the station end of the tunnel, but none within the tunnel itself. On this occasion the train only partially came up to the station platform, the last two carriages being within the tunnel. The last but one stopped 215] *opposite the narrow end of the platform; the last, in which Mr. Bridges was riding, was opposite the heap of hard rubbish. A passenger (afterwards called as witness at the trial), who was in the last carriage but one, heard the name of the station called out in the usual way and got out; he alighted on the narrow platform; "after he got out he heard the warning, 'Keep your seats,' after which the train moved on to the station. The witness hearing a groan, proceeded farther back into the tunnel, and found the deceased lying with his legs across the rails, between the wheels of the carriage, and his body on the rubbish. The wheels had not touched his legs or body ('). He was lying about ten feet from the end of the slope, and farther within the tunnel." His leg was broken, and he had received mortal internal injuries from the fall.

Mr. Justice Blackburn was of opinion that there was no evidence of negligence on the part of the defendants, and directed a nonsuit; but the jury expressing a strong opinion to the contrary, a verdict was taken for the plaintiff, the jury assessing the damages at £1,200. The nonsuit was then entered, but leave was reserved to move to enter the verdict for the plaintiff for the damages thus contingently assessed.

A rule was accordingly moved for, and, after argument in the Court of Queen's Bench, was refused. On appeal to

(1) This was the statement in the case, which is here much confused, for the train is represented to have "moved on," as if it had done so before the groan was heard, and yet the deceased is represented to have been found with his legs between

the wheels, neither of which had touched him. The order in which the facts occurred was most probably this, the witness found the deceased, moved his legs from between the wheels, then heard the warning, and the train moved on.

the Exchequer Chamber the facts were stated in a case, power being reserved to the judges to draw inferences of fact. The case was heard, and the judgment of the court below was affirmed by four judges to three⁽¹⁾. This appeal was then brought.

The judges were summoned, and Lord Chief Baron Kelly, Mr. Baron Martin⁽²⁾, Mr. Justice Keating, Mr. Justice Brett, Mr. Justice Denman, and Mr. Baron Pollock attended.

*Mr. *Henry James*, Q.C., and Mr. *Kemp*, (Mr. [216 *Snagge* was with them), for the plaintiff in error: The question here is, whether there was evidence of negligence on the part of the defendants, which ought to have been left to the jury. There is no question raised as to whether the deceased was contributing to his own injury. The sole question is, was there evidence of negligence on the part of the defendants. There was plain evidence of it. In the first place the train stopped while a portion of it was still in the tunnel; that part of the tunnel was unlighted; and it was not a fit and safe place for passengers to alight. Nevertheless they believed that they were required to alight there, for the name of the station was called; and calling out the name of the station is an invitation, and, indeed, something more, to all passengers who have taken tickets for that station, to alight there. If they do not so alight, they will be carried on to the next station, and will there be compelled by the company to pay additional fare, and a return fare for the back journey. The call, therefore, is an authoritative request to alight, and is universally so considered. The penalty for neglecting it is not merely the passenger's own loss of time and his own inconvenience, but the liability to pay additional fares, which liability may be enforced by legal compulsion. The passenger holds a contract by which on his part he binds himself to get out of the train at a particular station, and his not doing so is not merely a breach of contract, it may be treated as an offence. The calling out the name of the station is, therefore, an authoritative demand upon the passenger to perform his contract, and if a passenger was proceeded against for travelling without a ticket, the fact that the name of the station was called out would be treated, against him, as complete evidence of notice. In *Foy v. The Brighton Railway Company*⁽³⁾ there was not room for the whole train to stop at the platform; the passengers were required to alight; a lady did alight in a dangerous place, and though she had jumped down with-

(1) Law Rep., 6 Q. B., 377.

(2) Mr. Baron Martin heard the argu-

ment, but retired from the bench before the judges' opinions were delivered.

(3) 18 C. B. (N.S.), 225.

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out waiting to be assisted, the jury having found that the company had been guilty of negligence in not providing reasonable means of alighting, and having given her damages, the court refused to disturb the verdict.

217] *In *Siner v. The Great Western Railway Company* (¹), there was no invitation to alight, and that in substance constituted the difference which excused the company. The same excuse could not apply in *Cockle v. The South Eastern Railway Company* (²). In the course of the judgment in that case (³), delivered by Lord Chief Justice Cockburn, *Praeger v. The Bristol and Exeter Railway Company* (⁴) is referred to, and there his lordship, making full allowance for a train not being able to be wholly brought up to the platform, declared that if the passenger got out on the invitation of an official, the means of safety ought to be provided for him. And *Siner v. The Great Western Railway Company* (⁵) was distinguished, and it was declared that opening the door by the guard was an invitation to alight. The case of *Gee v. The Metropolitan Railway Company* (⁶) is decisive to show that in not taking care to have the doors of carriages properly fastened, so as to be secure, a company may be guilty of negligence, and be held liable in damages; and the case of *Adams v. The Lancashire and Yorkshire Railway Company* (⁷), which seemed to have followed a different rule (though there the subject of contributory negligence was introduced, and really decided the case), was questioned. And *Gee v. The Metropolitan Railway Company* (⁸) expressly recognized the rule, that where there is evidence of negligence on the part of the defendants, though there may also be evidence of contributory negligence on the part of the plaintiff, that must always be a question for the jury, and it is not a case for a nonsuit.

Now here there could be no doubt that in fact there had been negligence on the part of the company's servants. They brought the train to a stand at an improper place. They had called out the name of the station, which was a plain and direct intimation that that was the place at which the passengers going to that station ought to alight; and when there had been time enough for this erroneous intimation to produce its full effect, they showed that they felt it was wrong by telling the passengers to keep their seats. This itself was evidence of the previous negligence.

(¹) Law Rep., 4 Ex., 117.

(²) Law Rep., 7 C. P., 321.

(³) Ibid., 323.

(⁴) 24 L. T. (N.S.), 105; see Law Rep., 7 C. P., 323-4.

(⁵) Law Rep., 8 Q. B., 161; and see p. 169.

(⁶) Law Rep., 4 C. P., 732.

(⁷) Law Rep., 4 C. P., 732.

*Sir J. Karslake, Q.C., and Mr. Aspinall, Q.C., [218 (Mr. A. G. Shiell was with them), for the defendants in error: The judgment here must be affirmed unless it clearly appears that the deceased man was killed by the negligence of the company's servants. By the allegations in the declaration, that is the case which the plaintiff undertakes to make out. The evidence must show that distinctly, and must show it to have occurred independently of any other cause. That is well put by Mr. Justice Brett in *Gee v. The Metropolitan Railway Company* ⁽¹⁾. He says that the plaintiff must show "that the negligence of the defendants was the cause of the plaintiff's injury; and farther, that it was the sole cause, in a certain sense The meaning of the phrase, 'that it must be solely caused by the defendants,' is, solely caused as between them and the plaintiff, that is to say, that it is caused by the negligence of the defendants without being contributed to by any negligence or want of care on the part of the plaintiff." In *Tooney v. The London and Brighton Railway Company* ⁽²⁾ a person inquired for one room, and by mistake went to another, where he fell down some steps and was injured. It was there said in judgment that the company had not been guilty of negligence, for that there was no evidence that the steps were dangerous, and Mr. Justice Willes remarked, "It is impossible for any one so to dispose of his property that a man may not by accident or negligence injure himself upon it." It was so here; the rubbish was not shown to be actually dangerous in itself, any more than were the stairs in that case; and without such evidence being given, the plaintiff could not recover. . So in *Crafter v. The Metropolitan Railway Company* ⁽³⁾, where the plaintiff fell down a staircase, the edges of the stairs of which were topped with brass, which by use had become smooth and slippery, and the witnesses described the staircase as unsafe from that cause, and were of opinion that there should be a hand-rail by the side, the court thought that there was no evidence of negligence to go to the jury, and a nonsuit was entered. In *Adams v. The Lancashire and Yorkshire Railway Company* ⁽⁴⁾, it was held that the action could *not be maintained on [219 account of the absence of evidence of negligence. There, a door of the carriage being insecurely fastened, flew open several times, and was shut by the passenger, who in his last effort to close it, injured himself. The fact that it would not continue shut was held not alone to constitute proof of

⁽¹⁾ Law Rep., 8 Q. B., 174.

⁽³⁾ Law Rep., 1 C. P., 300.

⁽²⁾ 3 C. B. (N.S.), 149; 27 L. J. (C.P.), 39.

⁽⁴⁾ Law Rep., 4 C. P., 739.

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negligence on the part of the company. The case of *Foy v. The Brighton Railway Company* (*) does not apply to the present, for there the train was drawn up, and drawn up finally, at a wrong place, and there was an express invitation to the passengers to alight. There was no such invitation here—calling out the name of the station did not amount to that, nor had the train finally stopped when the deceased, without cause or invitation, attempted to get out of it. In *Siner v. The Great Western Railway Company* (†) the train had finally stopped, but there, as the lady had got out of her own accord, and had received an injury in doing so, the court of Exchequer Chamber held that there was no evidence of negligence to affect the company, although there was no doubt that the spot where the plaintiffs' carriage stopped was not the proper one—that carriage having overshot the platform, which was too short for the length of that particular train. In *Cockle v. The South Eastern Railway Company* (‡) the platform was long enough for the train, but the last carriage of the train did not reach the platform, and the stoppage was a final stoppage; no warning was given that the carriage was not close to the platform, or that care would be necessary in alighting; there was no light at that place, nor any care taken to enable the passengers in the last carriages to alight; and all these circumstances taken together were held to amount to evidence of negligence. Here, the train had not come to a final standstill, and the other circumstances were different, and that case, therefore, could not be held to govern the present. In *Praeger v. The Great Western Railway Company* (†), the guard opened the door of the carriage, which the court construed as “an invitation to alight and to alight with safety.” There was nothing of that kind here and therefore that case was inapplicable. But even there it was expressly stated that the passengers 220] were bound *to use reasonable care. It was impossible to say that reasonable care had been used here, for the mischief must have been occasioned by the mode of getting out, since it was evident that the wheels of the carriage had not passed over the deceased, nor inflicted any injury on his person. [LORD COLONSAY: In what position was the man found?] The case states that he was “lying with his legs across the rails, between the wheels of the carriage, and his body on the rubbish. The wheels had not touched his legs or body.” [LORD COLONSAY: Does not that show that the

(*) 18 C. B. (N.S.), 225.

(†) Law Rep., 4 Ex., 117.

(‡) Law Rep., 7 C. P., 321.

(*) 24 L. T., 105; see Law Rep., 7 C. P., 323-4.

train had at that time come to a standstill?] The injury happened from his attempt to alight, and was not occasioned by the train.

All these authorities, however the circumstances of each case differed from those of any other, really established the principle that the passenger himself must use reasonable care, and could not make the company liable for an injury caused by his want of it, and he must show that the injury was the result of actual negligence on the part of the company. Here there was no proof of the kind; there was no invitation to alight, there was no act of the company's servants that led the deceased into danger. On the contrary, the warning to "Keep your seats," showed that care had been taken, and distinctly proved that the train had not come to a final standstill, and consequently that there was no necessity, and, if no necessity, no excuse, for the passengers attempting to alight. The deceased ought to have waited till the train drew up at the proper platform, when he might have alighted with perfect safety.

There being no evidence on which the jury could reasonably find, in point of fact, that there had been negligence, there was no necessity for leaving the case to the jury, but the judge rightly took on himself to say that no case had been made out for the plaintiff and that there must be a nonsuit. That principle was distinctly laid down in *Ryder v. Wombwell* (').

LORD CAIRNS, who presided in the absence of The LORD CHANCELLOR, proposed that the following question should be put to the judges: Whether in the facts stated in the special case, and having *regard to the liberty thereby [221] given to the court to draw any inference or find any facts from the facts therein stated, there was evidence of negligence on the part of the respondents which ought to have been left to the jury?

The LORD CHIEF BARON requested time for the judges to answer the question.

May 15, 1874. MR. BARON POLLOCK: My answer to your lordships' question is in the affirmative.

[The learned Baron, having stated the facts of the case, said:] The general rule which prescribes the duty of the judge presiding at *Nisi Prius*, when the question is raised whether, at the close of the plaintiff's case, there is evidence which ought to be left to a jury, is laid down in the judgment of the court of Exchequer Chamber in *Ryder v. Wombwell* ('), where the question being whether articles supplied

(') Law Rep., 4 Ex., 32.

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by the plaintiff to the defendant, who was an infant, were "necessaries," the court said: "The first question is, whether there was any evidence to go to the jury that either of the above articles was of that description? Such a question is one of mixed law and fact; in so far as it is a question of fact it must be determined by a jury, subject no doubt to the control of the court, who may set aside the verdict and submit the question to the decision of another jury; but there is in every case, not merely in those arising on a plea of infancy, a preliminary question which is one of law, namely, whether there is any evidence on which the jury could properly find the question for the party on whom the onus of proof lies. If there is not, the judge ought to withdraw the question from the jury and direct a nonsuit if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant."

This is a clear exposition of the rule, and it has been generally acquiesced in and acted upon, and it follows from it that although the question of negligence or no negligence is usually one of pure fact, and therefore for the jury, it is the duty of the judge to keep in view a distinct legal definition of negligence as applicable to the particular case; and if the 222] facts proved by the plaintiff do *not, whatever view can be reasonably taken of them, or inference drawn from them by the jurors, present an hypothesis which comes within the legal definition, then to withdraw them from their consideration.

I commence, therefore, by considering what was the duty of the defendants towards their passengers upon the occasion in question, the non-observance of which would constitute negligence? It appears to me that their duty may be stated generally by saying that they were bound to provide a proper place, and proper means for alighting at the Highbury Station, and this involves not merely the actual formation of the platform, and the length and position of the train, but also the time at which the passengers could, with reference to the usual course of the journey and the conduct of the company's servants, reasonably suppose that the proper time for alighting had arrived.

In the present case the facts given in evidence by the plaintiff fall short of those which actually occurred, and this seems to be, as in many similar cases it is, essential to the character of the event. Because although the evidence which relates to the stopping of the train, whilst the last two of the passenger carriages were within the tunnel, and to the calling out by the porters first of "Highbury" and then

"Keep your seats," must, being uncontradicted, be accepted as fact; the precise time when, and the manner in which the deceased attempted to alight is left to be inferred.

The jurymen, had the facts been left to them, might have inferred that before the proper time for the deceased to alight had arrived, the warning "Keep your seats" had been given, and the train had moved on towards the station, and if this had been so, the place for alighting provided by the company was a proper one, having reference to the time at which the deceased had a right to claim such provision,—or inverting the proposition, he had no right to alight at an earlier period, and therefore when he did so, he by his own imprudence contributed to the injuries he received. But it must be remembered that a passenger who was called as a witness was in the last carriage but one, and he heard "Highbury" called, and got out before the warning "Keep your seats" was given, and alighted safely; because although within the tunnel his carriage was opposite to the narrow platform.

*Now take this fact, together with the other evidence [223 given by the plaintiff as it stood, without contradiction or explanation by the defendants, the jury might fairly have found that, looking to the ordinary requirements of the passenger traffic, the length of the platform was insufficient, or if in itself sufficient, that there was negligence on the part of those in charge of the train, in stopping it before it was wholly alongside the platform, or on the part of the porters in calling out "Highbury" before the train was wholly alongside. The defendants might have shown that there were exceptional circumstances which rebutted this inference, as that the break power was diminished by some accident over which they had no control, that the rails were by some unforeseen event unusually slippery, or that a dense fog prevented the porters from seeing the exact position of the train, but all this is beside the present question.

Then it is said that assuming there was some evidence of negligence on the part of the defendants, the plaintiff must have acted so rashly or carelessly as to disentitle him to recover. I say *must*, because that he may have done so would not be sufficient to support the defendants' contention. It appears to me that the jurors were entitled to assume that *prima facie* the deceased would conduct himself with ordinary prudence and discretion, and that there was evidence from which they might fairly have found that the deceased, having heard "Highbury" called out, and finding the train had stopped, got out of the carriage before it moved out of

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the tunnel, and whilst it was opposite the hard rubbish, supposing that he would alight on the platform. Had he known the rubbish was there instead of the platform, to jump out on to it with such a fall as would break his leg, and occasion mortal internal injuries, would indeed have been negligent and rash in the extreme. But it was two hours after sunset, there was no light within the tunnel, and the deceased was near sighted, and he might well have supposed he would step on to the platform, as did the passenger in the next carriage, with impunity.

The plaintiff no doubt is bound to make out her case, and cannot by a bare suggestion challenge its rebuttal, and if what I have stated was all mere speculation, it ought not to 224] have gone to *the jury, but if it was an inference which could be fairly drawn from the facts proved in the same manner as things unseen or unproved—which in the eye of the law are the same—are constantly inferred and found as facts by a jury, then the evidence should have been submitted to the jury, together with any which the defendants chose to adduce, and which might have exculpated or farther inculpated them according as their witnesses knew more of the occurrence and confirmed or displaced the evidence for the plaintiff.

This is not merely the view which presents itself to my mind upon the consideration of the facts themselves, but the more I have studied the judgments of those learned judges from whose opinion I have the misfortune to differ, the more I have been led to the conclusion that it cannot correctly be affirmed that under no circumstances could the jury have reasonably drawn the two inferences that there was negligence of the company's servants and no contributory negligence on the part of the deceased.

In this view of the case it is unnecessary for me to consider piecemeal the conduct of the defendants' servants, or the proper effect to be attributed to the calling out by the porter of the name of the station. Its intention as an invitation to alight must obviously be often conditional, and I concur in the view that is taken of it by the late Mr. Justice Willes in his judgment in this case in the Court of Exchequer Chamber, where he says: "It is an announcement by the railway officers that the train is approaching or has arrived at the platform, and that the passengers may get out when the train stops at the platform, or, under circumstances, induced and caused by the company, in which the man reasonably supposes he is getting out at the place where the company intended him to alight."

In the course of the argument at the bar several cases were cited in which actions had been brought by railway passengers against the companies by which they were carried to recover compensation for injuries received in consequence of alleged omission to supply proper and safe means for alighting; but as these cases varied in their circumstances, and none of them was identical with the present, I do not feel that farther allusion to them would assist your lordships, though I ought to add that I can find no *decision [225 which is contrary in principle to the view which I respectfully submit.

Mr. JUSTICE DENMAN: My lords, in answer to the question put by your lordships, I am of opinion that in the facts stated in the special case, and having regard to the liberty thereby given to the court to draw any inference or find any facts from the facts therein stated, there was evidence of negligence on the part of the respondents which ought to have been left to the jury.

The action was brought by the plaintiff as executrix of her deceased husband for damages occasioned by his loss. The declaration stated that the deceased was a passenger on the defendants' line, to be carried to a station called Highbury Station; "that the defendants did not use due and proper care in and about the carrying of him as such passenger, and so negligently conducted themselves that the deceased whilst getting out of and descending from a carriage, was cast and thrown, and fell and came down to and upon the ground, and was so injured that he died."

This declaration is certainly somewhat vague; but no objection on that account appears to be open to the defendants, inasmuch as the leave given at the trial was to enter the verdict for a certain sum which the jury had assessed if the court should be of opinion that there was *any* evidence of negligence on the part of the defendants which could properly be left to the jury.

By this reservation I understand that the verdict was to be entered for the plaintiff for the sum assessed if the court should be of opinion that the accident which caused the death of the plaintiff's husband was, or might reasonably have been, found to have been due to any proved fact or set of facts which might be reasonably considered by a jury to constitute negligence on the part of the defendants or their servants, in the course of the conveyance of the deceased to, and his safe deposit at, Highbury Station, or at least in the latter respect.

Plans of the station at which the plaintiff was to have

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alighted, and of the scene of the accident, were used at the trial, and were annexed to, and form part of, the special 226] case. The court was *to be at liberty to draw any inferences of fact from these plans, as well as from the facts stated.

The jury at the trial, as appears from the case, after hearing the plaintiff's evidence, expressed a strong opinion in favor of the plaintiff. The learned judge who tried the cause nonsuited the plaintiff; but owing to the opinion thus expressed, took their opinion as to the amount of damages, and gave her leave to move in the terms above mentioned.

The material facts of the case, as it appears to me, may be fairly stated as follows: I do not use the exact language of the special case, but state what appears to me to be the fair result, drawing only such inferences as the understanding between the parties empowers the court to draw.

The deceased, a man of fifty-two years of age, and very short-sighted, travelled on the night in question (the 20th of January), in about the centre compartment of a second class-carriage, the hindmost of a train of five or six carriages. It was 7 p.m., and therefore dark. His short-sightedness would on the one hand render it incumbent upon him to take more care than would be needed by a sharp-sighted person, because he could not trust to appearances so confidently. On the other hand, it would go to account for a mistake on his part, which might not have been made by a man of good vision, as to the actual condition of the place upon which he was alighting.

The deceased lived close to the Highbury Station, and had for a considerable time been a daily traveller on the line to and from that station. He would therefore well know the proper place at which to alight, as well as the usual habits of the trains. This, on the one hand, would give him a better opportunity than a stranger of avoiding danger by avoiding any place of alighting which he did not know to be safe, as distinguished from those places which he knew to be safe; on the other hand, this very familiarity with the station might have a tendency to mislead him with a false security if he had frequently on other occasions alighted or known others to alight at the same place, and found it safe and practicable, and if on the particular occasion an unexpected and dangerous obstruction had been placed at that spot.

Approaching the station there is a tunnel, as described in 227] the *case and as shown upon the plan. On the night in question the train, from some unexplained cause, but which the defendants might have explained if the nonsuit

had not taken place, stopped whilst the last two carriages were in the tunnel. The platform ran for a short distance under the tunnel at the same level as at the station proper, it then gradually sloped down to the level of the line. The front compartment of the carriage in which the deceased sat was opposite the slope. On the night in question there lay a quantity of hard rubbish of the average height of 1 ft. 1 in., and of the average width of 2 feet, which extended from the foot of the slope for about 50 feet farther into the tunnel, so that any person getting out of that compartment in which the plaintiff was, would, if he put his foot down at that place believing the ground to be in its normal state and at its usual level, have probably come in contact with the heap of rubbish, and fallen in consequence. It was, I think, also quite possible on the night in question that a person even with good sight might have mistaken the heap in question either for that part of the platform which lay within the tunnel, or for the upper part of the slope above mentioned. There was no lamp in the tunnel, but there was one at the mouth of the tunnel, 27 ft. 11 in. from the spot where the deceased alighted. Owing to the dampness of the night the tunnel was full of steam. The surface of the heap described above was irregular, so that if a passenger in alighting once stumbled over it he might in struggling to save himself, have fallen in such a manner as to cause a serious accident. There was a cry of "Highbury" as the train was stopping or after it stopped, and immediately afterwards a cry of "Keep your seats." The train moved on again after stopping, but not, as I infer, until after the accident had happened. The deceased was found 27 ft. 11 in. from the lamp above mentioned, and about 10 feet from the foot of the slope and farther within the tunnel.

It is stated in the case, and must be taken as a fact, that the deceased broke his leg in attempting to alight, and received mortal injuries by his fall; from which I infer that either by alighting on the rubbish before he expected to touch the ground he broke his leg from the sudden resistance he unexpectedly met with, or that he fell in consequence of so alighting and broke his leg by falling on the irregular hard surface of the heap of rubbish, whether from *a first or second or subsequent fall, or blow of [228 the leg against the rubbish. It is expressly found that the wheels had not touched his legs or body.

Upon the above statement of the facts of the case, as I understand them, having drawn all such inferences as seem to me to be the natural and proper inferences to be drawn,

I have felt very considerable doubt, on one ground only, whether this was a case in which the evidence ought to have been left to the jury. The ground I refer to is, whether taking everything to have been proved which I have stated, and all the inferences I have drawn to be correct, the cause of the accident was not left in so much doubt and obscurity that it might properly be laid down that the plaintiff, on whom undoubtedly the burthen of the proof lay, had failed to prove that the death of the plaintiff resulted from negligence of the company, and had only made out a case of death by an accident consistent with other possible and even probable causes. The judgment of Channel, B., in the court below, puts this view of the case as forcibly as it can be put; but on full consideration of the whole of the case, the evidence given, the inferences fairly to be drawn, the plans put in at the trial, and the measurements given upon them, I have come to the conclusion that the matter is not left in such a state, as regards proof, as to justify a judge or court in withdrawing the case from the consideration of a jury.

Before it could be decided whether the facts proved constituted reasonable evidence of negligence, a great many separate facts had to be considered, and some inferences must inevitably be drawn. Probabilities were to be taken into account, plans were to be examined. If a view by the jury had taken place (which does not appear) such view would have been of considerable importance in enabling the viewers to appreciate the evidence, and to report what they might have observed either to the judge or their fellow jurors, and such report might reasonably influence the mind of the judge in deciding whether there was a case to go to the jury or not; but it is impossible to mention all these matters without feeling that they are in their nature questions more for the consideration of a jury than of a judge or court. This observation becomes still more cogent if it be admitted, as I think it must be admitted, that whoever decided the question of whether there was evidence to go *to the jury, would be entitled, if not bound, to take into account his own experience of railway travelling, usual construction of stations and platforms, usual mode of stopping, alighting, giving warning by voice or lights, and other matters relevant to the present case.

The question of negligence is one peculiarly within the province of a jury, and I apprehend that it is a question with the decision of which the judge should not interfere, unless he is very certain that the question has been reduced

to a mere definition of what is the defendants' legal duty in respect of matters wherein negligence is alleged, upon a well ascertained and indisputable state of facts. The legal duty itself often depends upon the question what would it be reasonable for a plaintiff or a defendant to do under a complicated state of facts; and this also is a question not of law but of fact, and as such peculiarly within the province of a jury.

After fully considering the evidence in this case, I am strongly of opinion that there was evidence of negligence which ought to have been left to the jury—evidence upon which the jury might not unreasonably have found such negligence to have caused the death of the plaintiff's husband—evidence moreover (in case your lordships should consider that question open upon the reservation in this case) upon which the jury might have reasonably found that this accident was *wholly* due to the defendants' negligence, and to no other cause whatever.

I do not think it necessary for the decision of the question put by your lordships that the court should be able to say exactly how the accident happened; but I may be permitted to say that judging from the statements in the case, and from the plans, and from such inferences as I draw from both, I feel satisfied that the accident happened through negligence of the defendants or their servants in not having some person, guard, porter, policeman, or other person, either by voice or light, to prevent passengers from running the risk of falling over the heap of hard rubbish which lay along the side of the hinder carriage of the train on the night in question.

It is, however, unnecessary to decide whether a verdict for the plaintiff on this ground would have been one in which I, if I had been on the jury, should have concurred. It is enough to say that *in my judgment there was [230 evidence upon which a jury might reasonably find that this accident happened wholly through the negligence of the defendants in not providing for the safe alighting of passengers at that place, on that night, and under these circumstances.

The argument and judgments in the court below turned mainly on the meaning to be attributed to the calling out "Highbury" on the arrival of the train. I do not feel myself entitled to lay down any rule to the effect that such calling out did or did not amount to an invitation to alight. I think, however, that the jurors were entitled to consider that fact as one of importance in the case, especially when

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coupled with the other fact found, that the words "Keep your seats" were called out shortly afterwards, though not, as I infer, until after the accident had happened. I think the jurymen were entitled to put their own construction on these facts in connection with the other circumstances of the case.

On the whole I think this case was one which ought to have been left to the jury; and though in most cases I should feel that the difference which exists between my own opinion and that of the very learned judges who constituted the majority in the court below, was a strong ground for causing me to doubt the correctness of my own view, yet I must own that in this case the great difference of opinion which appears in the judgments below increases my confidence in thinking that the question was one properly for the jury and not for the judge, and the fact that cases of the class to which the present belongs so constantly divide the judges in opinion, and often lead to decisions which it is almost impossible to reconcile with each other, seems to me to afford an additional reason for thinking that in this case the learned judge by nonsuited the plaintiff departed from the old maxim of the English law, "*Ad questionem facti non respondent Judices*."

My lords, my Brother Keating concurs in this opinion.

MR. JUSTICE BRETT: My lords, before determining whether there is or is not evidence fit to be left to a jury in support of questions, one must know what the questions are which are to be so left. It seems impossible to answer satisfactorily the question whether there was or was not evidence of negligence which ought to have been left to the jury, without first determining the form in which the question of negligence, if left, should be judicially stated to a jury. It is farther necessary, as it seems to me, to consider the formula which should be applied to the facts in evidence, in order to see whether they ought or ought not to be left to the jury. And farther, how much of the dealing with facts is within the province of the judge, and how much is exclusively within the province of the jury. These are the questions which have been differently treated in form by different judges, and which might be rendered more easy of solution as they arise, if definite propositions with regard to them were enunciated by a paramount authority. They are all questions of law; that is to say, of principle. It seems to me that nothing can be a principle or rule of law, that is to say, there is nothing which a court or judge can have to

rule as a question of law, which cannot be brought within some general rule or principle which may be predicated.

The cases to which your lordships' question refers are cases in which a passenger by railway brings an action against a railway company to recover damages for injuries alleged to have been incurred by reason of the negligence of the defendants or their servants. What is the direction in point of law which ought to be given to the jury at the trial? It is this: that the plaintiff founds his claim upon an allegation that he has suffered injury by reason of the negligence of the defendants or their servants. If he has so suffered from such a cause his claim is well founded, because it is an implied part of the contract of carriage that the defendants and their servants will use reasonable care and skill in the conveyance of the passenger to his agreed destination. And if the defendants or their servants have been negligent or wanting in reasonable skill in the conveyance, and the passenger has been injured, there has been a breach of contract for which the defendants are liable, and for which the passenger is entitled to compensation by way of damages.

The proposition therefore which the plaintiff undertakes to substantiate is that he has suffered injury by reason of the negligence of the defendants or their servants. In order to make this out the plaintiff must prove that the defendants or their servants, *or both, have been guilty of [232 negligence, that such negligence caused him injury, that as between him and the defendants it was the sole cause of the injury; that is to say, that he did not by any negligence of his own contribute to the injury he has suffered. This direction, however, is not yet sufficient. It requires to be amplified by a legal definition of what amounts to negligence. That definition is, that negligence consists in the doing of some act which a person of ordinary care and skill would not do under the circumstances, or in the omitting to do some act which a person of ordinary care and skill would do under the circumstances. The final and full and strict direction to a jury therefore in such cases is contained in the following questions: Have the defendants or their servants done anything in the conveyance of the plaintiff to his destination which persons of ordinary care and skill under the circumstances would not have done, or have they or their servants omitted to do anything which persons of ordinary care and skill under the circumstances would have done? Have they or their servants by such act of commission or omission caused injury to the plaintiff? Did the plain-

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tiff do anything which a person of ordinary care and skill would not have done under the circumstances, or omit to do anything which a person of ordinary care and skill would have done under the circumstances, and thereby contribute to the accident? The plaintiff can only recover if he satisfies the jury by evidence that the defendants or their servants were guilty of negligence as described, and that he has been injured thereby, and that he has not been guilty of negligence as described contributing to the accident.

Such is the direction to the jury, but before giving this direction it is the duty of the judge to determine whether there is evidence fit to be left to the jury on each of the propositions which it is necessary that the plaintiff should establish. This being a duty cast exclusively on the judge is a question to be decided according to some proposition or rule of law. What is that proposition or rule of law which the judge is bound to apply to the evidence in order to determine this question of law? It cannot merely be, is there evidence? That has no meaning without a farther proposition defining when it is to be considered in point of law that there is evidence. Without a proposition or rule 233] *which can be enunciated or predicated, there is no rule of law; a rule of law can always be predicated in terms. The proposition seems to me to be this: are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain? It may be said that this is so indefinite as to amount to no rule, that it leaves the judge after all to say whether in his individual opinion the facts in evidence would prove the proposition; but I cannot think so. It is surely possible to admit that reasonable and fair men might come to a conclusion which one self would not arrive at. And judges may be able reasonably to say frequently, that although they would not upon the facts have come to the same conclusion to which the jury has come, yet they or he cannot say but that reasonable and fair men might agree with the conclusion of the jury; or, in other words, that, although they would not have arrived at the same conclusion, it is not contrary to reason to have arrived at it.

The judge must, therefore, before directing the jury in the terms above set forth, first determine the following questions: Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that the plaintiff had been injured by some act of commission or omission by the defendants or their servants? Are there

facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that any such act of commission or omission was such as a person of reasonable care and skill under the same circumstances would have done or omitted to do? Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that the plaintiff had not, in a manner contributing to the accident, done anything or omitted to do anything which a person of ordinary care and skill under the same circumstances would not have done or would have done?

If the judge, not deciding the final issues according to his own individual view, but determining according to the propositions last laid down, holds that there is no evidence fit to be left to the jury on some one of the cardinal questions before stated, he must direct the jury as matter of law that there is no case in favor of the plaintiff, or he must nonsuit the plaintiff. If he holds that *there is evidence on [234 each of the cardinal questions, he must leave the case to the jury according to the direction in point of law before laid down in this opinion. When the judge has so directed the jury as to the law he has finished all which it is legal for him exclusively to determine in the case. He ought then, though I do not think there is any legal absolute obligation on him to do so, to point out to the jurors the bearing of the facts in evidence upon each of the questions which they must determine, and which of the facts are in his judgment in dispute, and that there are not only the facts directly deposed to which are to be considered, but facts or propositions of fact which are to be inferred from the facts directly deposed to, and finally that it is for them to say whether the facts directly in evidence and adopted by them, and the facts and propositions of fact inferred by them, do or do not amount in their judgment to proof of the propositions which the plaintiff is bound to maintain. But the judge has no legal right either directly or indirectly to force upon the jury his view of any fact or inference of fact. Yet he will do so if he states questions of fact as if they were questions of law. For instance, when he asks whether what happened amounted to an invitation to the plaintiff to alight. If he leaves that question without explanation, he leads the jury to conclude that if there was nothing amounting to an invitation, the plaintiff in alighting must have been guilty of want of ordinary care. Yet, surely, he may not have been so guilty though there was nothing like an invitation. So when it is asked whether what was done or omitted amounted to a

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trap. The jurors are led to believe that if there was no trap the plaintiff must have been guilty of a want of ordinary care or skill in alighting. Yet, again, he may not have been so guilty, though there was nothing like a trap. So when judges have stated that the calling out of the name of a station is no intimation that the passengers may on the stopping of the train alight. That seems to me to be a matter of experience of life and habits, which is solely for the determination of the jury. And so, finally, when a judge lays down that if such and such things were done, or omitted to be done, there was or was not a want of ordinary care or skill, he has, in my opinion, laid down a proposition of fact and not of law. What men of ordinary care and skill 235] would or would not do under certain *circumstances is matter of experience, and so of fact, which a jury only ought to determine. It seems to me that it will aid the consideration of what is the proposition or rule of law which is to govern the determination of a judge whether there is or is not evidence fit to be left to a jury, to consider what duty with regard to facts is cast upon the judge after the jury has found a verdict. He must undoubtedly determine whether the verdict is against the weight of evidence. Here, again, I think that a definite rule of conduct, or, in other words, a definite proposition for legal application, which is, I think, a proposition of law, to be applied to the facts in evidence, should be laid down. That proposition cannot be whether the judge agrees in opinion with the jury. If so, the judge has left to the jury evidence which he has already decided to be such as it is not unreasonable to act upon, and yet when it is acted on he overrules it. I do not speak here of the cases in which a judge may, for precaution's sake, leave matter to the jury, reserving for more careful consideration by the court the question whether there was evidence fit to be left to the jury. The proposition or rule of conduct to be applied to the consideration of the verdict seems to me to be identical with that to be applied to the evidence before leaving the case to the jury. It is, again, not whether the judge would have decided in the same way, but whether the verdict is such as reasonable and fair men might not unfairly arrive at, or, in other words, whether the decision is such as would be clearly wrong in the judgment of the great majority of ordinarily reasonable and fair men.

The importance of the distinction as applied to this class of cases seems to me to be manifest. A judge may be of opinion that the calling out of the name of the station ought not in any way to actuate the passenger; jury after jury

may decide that according to the ordinary understanding both of railway officials and passengers it is an indication upon which a passenger may fairly rely that, directly the train stops he may, unless he receives some other warning, safely alight. A judge may think that if a passenger himself opens the carriage door and alights, it is conclusive against him that he alighted without ordinary care; jury after jury may find that a passenger may, without being guilty of a want of ordinary care, himself open the door and alight. A *judge may propose this dilemma: If the [236 passenger alights and falls when it is dark he is imprudent and cannot recover; if he descends and falls when it is light he is unskilful and cannot recover. A jury may find that neither part of this dilemma is true. If courts or a judge may overrule such decisions, because they or he do not agree with them, they ought logically to overrule decision after decision. And yet each successive decision would prove more distinctly the opinion of men of ordinary intelligence. If such decisions may be overruled on the mere ground that the courts or judges do not agree with them, juries are bound to matters of fact by the view of the judges as to facts. This cannot be.

But if the proposition which I have intimated as correct be true, and be enunciated by the authority of your lordships' House, the discussion will be narrowed, and it will be settled that the judge in determining whether there is evidence fit to be left to the jury, and the court or judge, in determining whether a verdict is against the weight of evidence, ought not to decide on the mere ground of their or his own individual opinion, but to determine whether it can be truly said that men of ordinary sense and fairness might not decide in one way or the other. This view seems to me to be that adopted in the court of Exchequer Chamber in *Cockle v. The South Eastern Railway Company* (*).

My lords, the paramount importance which I attach to the enunciation of a rule of conduct or of decision by your lordships is, that it will prevent the decisions in these cases from being governed by the many different views taken by different judges of facts of every day occurrence in life, and which no one can say are questions of law. The kind of discussion which may be found in this case in the courts below, and the differing grounds of decision to be found in so many cases, would not be repeated.

Applying to the question proposed by your lordships the rule I have submitted to be the right one, I cannot entertain

(*) Law Rep., 7 C. P., 321.

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any doubt that there was in this case evidence fit to be left to the jury, and I therefore answer your lordships' question in the affirmative.

237] *The LORD CHIEF BARON: My lords, having had the advantage of reading the opinions we have now heard delivered in this case by my brother Denman and my brother Pollock, in which, and in the chief reasons which they assign, I substantially concur; and having fully expressed the view I had taken upon the question now before your lordships, in the judgment which I pronounced in the Exchequer Chamber, and which has been reported⁽¹⁾, I forbear to trouble your lordships farther with the grounds upon which I submit that there was evidence of negligence on the part of the respondents which ought to have been left to the jury; except, indeed, to observe that as it appears that upon the arrival of the train at the station at which the deceased was to alight, an officer or servant of the company called out the name of the station, it became a question whether the deceased was or was not justified in presuming that he might alight with safety at that spot, and if he was justified in so presuming, whether, under all the circumstances of the case, there was negligence on the part of the company in not warning the passengers in the tunnel that it would be unsafe for them to alight there. And these are questions which could not be determined as matters of law, and which I am therefore of opinion ought to have been submitted to the jury. Then inasmuch as it appeared that there was afterwards a cry of "Keep your seats," again a question arose whether that was heard by the deceased in time to prevent him from alighting, and this also being a mere question of fact, was obviously for the jury and not for the judge to determine.

I am, therefore, of opinion that your lordships' question should be answered in the affirmative.

The LORD CHANCELLOR (Lord Cairns): My lords, I regret the delay which has taken place in the decision of this case. It is a case in which, in consequence of a certain amount of difference of opinion among the learned judges in the courts below, your lordships deemed it right to have the assistance of Her Majesty's Judges at the hearing of the appeal. 238] *Your lordships had the benefit of their presence in the last session of Parliament, but, from the circumstance that the learned judges were about to leave town for the summer circuit, it was impossible for them to return an answer in the last session to the questions which your lordships put to

(1) Law Rep., 6 Q. B., 408.

them. Their answer to those questions was however returned a few weeks since, and your lordships have now to dispose of the case. [His lordship here stated very minutely the facts of the case.]

My lords, in this state of things I will point out to your lordships, in the first place, that there are some of the facts which are perfectly clear and which admit of no dispute. It is perfectly clear that, before this accident occurred, the train had come to a standstill. It is perfectly clear that the carriage in which the deceased was seated was inside of the tunnel. It is equally clear that there was no platform opposite that part of the tunnel where his carriage stopped. It is perfectly clear that the tunnel at the place in question was, even on a clear night, imperfectly lighted; and on the night in question, the tunnel being filled with steam, it was practically without light. It is also clear that opposite the carriage where the deceased was seated there was, in place of a platform, a heap of hard rubbish; and it is clear that if the deceased in that state of things got out in the tunnel opposite this rubbish, he was exposed to the danger of receiving a fall from alighting on the rubbish in place of alighting on the platform.

Up to that point, my lords, it appears to me that there neither is negligence nor evidence of negligence to go to a jury. It was not negligence to stop the train in the tunnel; it was not necessarily negligence not to have a platform in the tunnel. But the question, and the only question in the case, appears to me to be this: Was there evidence to go to the jury that in this state of things the company or its servants so conducted themselves as to lead to the deceased getting out of the carriage at the time that he did get out of it? Now, my lords, I certainly do not desire to ask your lordships to lay down any rule whatever as to what may be the consequence, as a positive rule of law, of calling out the name of a station by the officers of a company. But your lordships will see that what was stated in evidence in this case, and, at the stage at which the trial stopped, was uncontradicted, *was this: A passenger who was in the [239 last carriage but one was called as a witness and gave evidence that he heard "Highbury" called at the far end of the platform. He got out, and after he got out he heard a warning, "Keep your seats;" after which the train moved on to the station. Hearing a groan, he had proceeded farther back into the tunnel, and found the deceased lying with his legs across the rails, having sustained injuries which it is admitted caused his death. Now, my lords, in

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that state of things, the train having actually stopped, the servants of the company having called out "Highbury," a station at which the train was intended to stop, and the requisite time having elapsed (as was proved by the witness whom I referred to) for any of the passengers to get out and leave the carriage, and then the same servants of the company having corrected their mistake, and called out "Keep your seats," thereby admitting that the first call was an invitation to leave the seats,—in that state of things it appears to me that, without explanation or contradiction from the other side, there clearly was, upon the facts which I have stated, evidence to go to the jury of negligence on the part of the servants of the defendants. My lords, I am bound to say that if it had fallen to me to review a verdict of a jury given against a company under these circumstances, without any evidence to explain the facts which I have stated, I should have been of opinion that the jury had come to a natural and proper conclusion. But the only question which your lordships have to deal with is, Was there in this case evidence of negligence to go to the jury? In my opinion there clearly was.

My lords, the fate of this litigation is somewhat singular. The course of it appears to me to afford a strong and marked proof of the advantage which sometimes arises from a fresh hearing, by way of appeal, of a cause of this kind. At the trial, as I have stated to your lordships, Mr. Justice Blackburn was of opinion that there was no evidence to go to the jury, and nonsuited the plaintiff. On the application to the Court of Queen's Bench for a rule to set aside the nonsuit, there were present Mr. Justice Blackburn, Mr. Justice Mellor, Mr. Justice Lush, and Lord Chief Justice Cockburn. As I understand the observations of the Lord Chief Justice, he would himself have been of opinion, with a certain qualification, that there was evidence of negligence to go to the 240] *jury; but he said, if a rule was granted, it would be certain in that court to be discharged, and therefore it was refused. I take it, therefore, that in the Court of Queen's Bench in this case there was that amount of difference of opinion to which I have referred. In the Court of Exchequer Chamber, four Barons of Exchequer, namely, Mr. Baron Bramwell, Mr. Baron Channell, Mr. Baron Pigott, and Mr. Baron Cleasby, were of opinion that the nonsuit was right, and that there was no evidence to go to the jury. The Lord Chief Baron, Mr. Justice Willes, and Mr. Justice Keating, were of a different opinion; therefore, there was a division of four against three. Your lordships have had the

benefit of the opinion of five learned judges, two of whom were those who had already given their opinions in the court below, namely, the Lord Chief Baron and Mr. Justice Keating, the other three being Mr. Justice Brett, Mr. Justice Denman, and Mr. Baron Pollock, and they are unanimously of opinion that there was evidence of negligence to go to the jury; and, so far as I am aware, any of your lordships who heard the case would also have no doubt that there was evidence of negligence to go to the jury. Therefore, looking both to the advice of the learned judges to this House, and to the opinion of your lordships, I think it may be taken that there has been no difference of opinion in this House that there was evidence to go to the jury. I think that that unanimity has been arrived at from the repeated hearings of this case, which have no doubt caused some delay and some expense; but I trust the case may be found useful in future as negating the idea that, under circumstances such as I have described, a case is to be withdrawn from the jury, and the mind of the jury not to be farther exercised upon it.

My lords, I submit to your lordships that the proper course is to reverse the judgment of the Exchequer Chamber, and (as has been agreed shall be done) to direct that, in the Court of Queen's Bench, judgment shall be entered up for the sum assessed by the jury, namely, £1,200.

LORD HATHERLEY⁽¹⁾: My lords, I entirely concur with the views taken of this case by the noble and learned lord on the woolsack, and concurring *with him especially [241 in that part of his observations in which he stated that he thought we were not bound to lay down any special rule as to what the effect of calling out the name of a station would be, I cannot help observing that when the name of a station has been called out, accompanied by a stoppage, and a considerable interval has elapsed (as has been proved by the evidence of a passenger to have occurred in this case), there is a certain amount of evidence to go to the jury to authorize the finding of a verdict for the plaintiff, unless some explanation could be given of the facts by the defendants, instead of their merely submitting that the plaintiff had not produced sufficient evidence to call upon them for a defence.

It is curious to remark how strongly the evidence, when you examine it, bears upon the interval of time during the stoppage. It appears that the passenger who gave evidence

⁽¹⁾ Lord Colonsay heard the argument, but died before the judgment was delivered.

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got out just as the unhappy passenger who was killed may have got out, and after he had got out he heard the warning, "Keep your seats," after which the train moved on into the station. And then the case says: "The witness, hearing a groan, proceeded farther back into the tunnel." At first you might read that as meaning that he heard the groan after he had heard the cry, "Keep your seats," and after the train had moved on into the station. But if you look narrowly into it, you will find that is not so, and that the train had not moved on when he heard this groan; for, having heard a groan, he proceeded farther back into the tunnel and found the deceased lying with his legs across the rails between the wheels of the carriage, and his body upon the rubbish—the wheels had not touched his legs or body. It is obvious that there could have been no motion forward, as his legs were between the wheels without the wheels touching him, and therefore it must have been a considerable time that this train was so stopped. The other passenger not only gets out, but has time to hear this groan, and has time to find the unhappy deceased with his legs between the wheels, and has time to find that the wheels have not moved on, or in any way touched him. The death was therefore occasioned in consequence of the fall. Now, in that state of circumstances, the train having stopped a sufficient length of time to enable these two passengers to get out, and it not 242] having been established in "any way that the cry, "Keep your seats," was made before these passengers got out—indeed, as regards one of them, it was clearly made after he had got out—I say, in this state of circumstances, I think it would be very strong to say that there was not evidence to go to the jury in this case.

My lords, I entirely concur with the course proposed to be taken by my noble and learned friend on the woolsack.

Judgment of the Court of Exchequer Chamber reversed, and the verdict to be entered for the plaintiff for the sum of £1,200.

Lords' Journals, 22d June, 1874.

Attorney for appellant: *James Fluker.*

Attorney for respondent: *James Blenkinsop.*

[With reference to the effect of an intimation conveyed to the public by the acts of railway officials, see *The North Eastern Railway Company v. Wanless*, ante, p. 1.]

SCOTCH APPEALS.

[Law Reports, 2 Scotch and Divorce Appeals, 347.]

March 24, 1874.

***CALEDONIAN RAILWAY COMPANY, Appellants; GREE- [347
NOCK AND WEMYSS BAY RAILWAY COMPANY, Respon-
dents.**

Compulsory Reference to Arbitration.

Where under an agreement, legislatively confirmed, the parties were bound to settle by arbitration all differences that might arise between them as to the meaning and effect of the agreement, or as to the mode of carrying it out, it was *held* by the House that the jurisdiction of the courts was, by this agreement, excluded, and that all disputes arising under it must be settled by arbitration.

Per the LORD CHANCELLOR⁽¹⁾: We have here no room for the application of the doctrine as to voluntary agreements; but have simply to consider the case arising upon an act of Parliament, forcing the parties to have their disputes settled, not by the ordinary tribunals of the country, but by arbitration.

In April, 1862, an agreement was concluded between the Caledonian Railway Company and the promoters of the Greenock and Wemyss Bay Railway Company, who had applied to Parliament for an act of incorporation, which passed in the course of the session. By the agreement, which was scheduled to the act, the Caledonian Railway Company undertook to work the projected line and also to contribute one-fourth to its capital. The line was opened in 1865, and has been worked since conformably to the agreement, which provided that the Caledonian Railway Company should be entitled to one-fourth share of the net revenue, in consideration of their contributions and assistance. It appeared, however, that they soon became dissatisfied with their receipts. In February, 1871, they brought the present action against the Greenock and Wemyss Railway Company demanding payment of several sums amounting to about £3,480, independently of interest.

The defenders pleaded, in the first place, that the action was excluded by a clause in the agreement which provided that all differences arising between the parties should be

⁽¹⁾ Lord Cairns.

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settled by arbitration⁽¹⁾; and, secondly, that after clearing the proper expenses of the Greenock and Wemyss Bay Railway, there was no surplus or balance remaining to meet the pursuer's claim.

348] *The Lord Ordinary⁽²⁾ sustained the first plea, and dismissed the action. Against his interlocutor the Caledonian Railway Company reclaimed to the First Division of the Inner House, who, taking the assistance of three judges of the Second Division, and making in all seven judges, decided on the 2d of July, 1872⁽³⁾, that the question "fell to be settled by arbitration under the 18th article of the agreement;—superseding further consideration of the cause until the said question should be settled by arbitration in the manner prescribed by the Railways Clauses Consolidation (Scotland) Act, 1845"⁽⁴⁾. Against this judgment the Caledonian Railway Company appealed to the House.

The *Attorney-General*⁽⁵⁾, and Mr. *Kay*, Q.C., were heard for the appellants.

The *Lord Advocate*⁽⁶⁾, and Mr. *Cotton*, Q.C., appeared for the respondents; but were not called upon to address the House, whose judgment was delivered at once, in conformity with the following opinion:

The LORD CHANCELLOR⁽⁷⁾: My lords, the question in this case is, whether the respondents were well founded in their first plea, which alleged that the action brought against them was excluded by clause 18 of the agreement. That agreement was entered into with the Caledonian Railway Company, then an incorporated company. The contractors on the other part were the promoters of the Greenock and Wemyss Bay Railway, all, or some of them, becoming afterwards its directors. The agreement would not, without more, have been binding on the Greenock and Wemyss Bay Railway Company, when incorporated; and therefore it was scheduled to the act of Parliament which incorporated the Greenock and Wemyss Bay Railway Company, and a special clause⁽⁸⁾ was inserted, reciting that:

An agreement had been entered into between the provisional directors of the Greenock and Wemyss Bay Railway Company and the Caledonian Railway Company, in relation to the construction and the maintenance of the railway and other works by this act authorized, the working and management of the traffic thereon, the fixing and apportionment between the said companies of tolls, rates, and

⁽¹⁾ See the Lord Chancellor's opinion, *infra*, p. 348.

⁽²⁾ Lord Ormisdale.

⁽³⁾ Scotch Reports, 3d Series, vol. x., p. 898.

⁽⁴⁾ 8 & 9 Vict. c. 33, s. 119.

⁽⁵⁾ Sir Richard Baggeallay.

⁽⁶⁾ Mr. Gordon, Q.C.

⁽⁷⁾ Lord Cairns.

⁽⁸⁾ The 59th.

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charges, and other matters in connection therewith; and it is expedient that the said agreement should be sanctioned. The said agreement shall be, and the same is hereby sanctioned and confirmed, and shall be as valid and obligatory upon the company and the Caledonian Railway Company respectively, as if those companies had been authorized by this act to enter into the said agreement, and as if the same had been duly executed by them after the passing of this act.

Up to this point, the enactment does no more than give statutory validity to the agreement; but the clause proceeds in these words:

And it shall be lawful for the company (that is, the Greenock and Wemyss Bay Railway Company) and the Caledonian Railway Company respectively, and they are hereby required, to implement and fulfil all the provisions and stipulations in the said agreement contained.

Now, my lords, I apprehend it to be clear beyond the possibility of argument, that when an agreement between two companies who are coming for an act of Parliament is scheduled to the act of Parliament, and when an enactment is found in the body of the act that each company shall be required to implement and fulfil all the provisions and stipulations in the agreement, every provision and stipulation in that agreement becomes as obligatory and binding on the two companies as if those provisions had been repeated in the form of statutory sections.

To find what is the provision contained in the statute with reference to the matter now under consideration we turn to the 18th clause of the agreement, which is as follows:

All differences which may arise between the parties hereto respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation, shall, from time to time, so often as any such questions or differences shall arise, be referred to arbitration in terms of the Railways Clauses Consolidation (Scotland) Act, 1845 (1).

I am at present addressing myself to the argument which was urged at the bar, that there was in this case nothing more than one of those voluntary agreements or contracts to refer to arbitration, which, without more, would not exclude the jurisdiction of the court. But it appears to me to be entirely a misapprehension to describe this as a voluntary agreement. It has become a statutory obligation. This 18th clause must now be read as if it were a *section [350 of the act, and as if the act had said in so many words that all differences which may arise between the parties hereto respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation, shall, from time to time, be referred to and settled by arbitration. It appears to me clear, beyond any doubt whatever, that we have here no room for the application of the doctrine which has so much occupied the attention of the courts as to the

(1) 8 & 9 Vict., c. 38, s. 119.

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effect of voluntary agreements, but simply to consider the case arising upon an act of Parliament forcing the parties to have their disputes settled, not by the ordinary tribunals of the country, but by a reference to arbitration.

There remains the question, is the dispute which has arisen a difference between the parties "respecting the true meaning or effect of this agreement, or the mode of carrying the same into operation? The Greenock and Wemyss Bay Railway Company were to make, and to be at all events the nominal proprietors of, their railway; but, when made, it was to be worked by the Caledonian Company. The Caledonian Company were to contribute £30,000 to a capital which was to amount in the whole to £120,000, and the remaining £90,000 was to be provided by the Greenock and Wemyss Bay Railway Company. In respect of their trouble and expenditure in working the railway, the Caledonian Company were, in the first instance, to have one-half (50 per cent.) of the gross earnings, to compensate them for the working expenses. The other moiety was to be placed in the hands of the proprietors of the line, the Greenock and Wemyss Bay Railway Company, and out of that other half, certain expenses connected with the maintenance of the line, and the maintenance of the Greenock and Wemyss Bay Railway Company, were to be deducted. Up to that point there is no dispute between the parties, and those deductions have from time to time been made in a manner against which no complaint is alleged. But then, over and above the capital of £120,000, the Greenock and Wemyss Bay Railway Company were to be allowed to borrow £40,000, and had what are called borrowing powers given to them for that purpose. Those borrowing powers were in substance an incorporation of the ordinary Clauses Consolidation Act, with which your lordships are familiar. Mortgages [351] of the undertaking were to be created, nor *was there any limitation whatever of the ordinary characteristics which borrowing powers possess.

The agreement went on to provide that after the expenses to which I have referred were deducted, the net earnings were to be divided, three-fourths being received by the Greenock and Wemyss Bay Railway Company and one-fourth by the Caledonian Railway Company.

The difference which has arisen between the parties here is not respecting the true meaning or effect of this agreement, because the words of the agreement are clear and plain enough, but respecting the mode of carrying the agreement into operation, having regard to the paramount rights of the

mortgagees which the legislature has allowed to be created. The contract to refer to arbitration is clearly obligatory, and it is equally clear that a difference has arisen as to the mode of carrying the agreement into operation, and, if so, Parliament has ordered that it shall be referred to the decision of an arbitrator.

It appears to me that the action in the Court of Session is excluded by the 18th clause of the agreement, and therefore, concurrently with the judges in the court below, I humbly move your lordships to dismiss this appeal with costs.

LORD CHELMSFORD: My lords, my noble and learned friend has put the question before your lordships so very clearly, that, agreeing as I do entirely with him, I do not think I can usefully add anything to what he has said.

LORD HATHERLEY: My lords, I am of the same opinion.

LORD SELBORNE: I also am of the same opinion.

Interlocutor affirmed; and appeal dismissed, with costs.

Agents for the appellants: *Grahames & Wardlaw.*

Agents for the respondents: *Simson, Wakeford & Simson.*

[Law Reports, 2 Scotch and Divorce Appeals, 361.]

April 21, 1874.

*WATT, Appellant; LIGERTWOOD AND DANIEL, [361 Respondents.

Contempt of Court—Imprisonment.

When a judge, in the legitimate exercise of his jurisdiction, is defiantly disobeyed, he may commit the offender instantly to prison for contempt of court.

Process-caption.

A document *in manibus curiæ* having been carried away by an agent regardless of the judge's remonstrances:

Held, that a process-caption was a proper remedy, and that notice of its issue was unnecessary.

THE appellant, an advocate in Aberdeen, presented, on behalf of a client, a petition praying an interdict from the sheriff against the sale of certain bathing machines. The petition was opposed. After hearing the appellant and the agents of the other party, on the 19th of March, 1867, the sheriff refused the interdict; but when he was about to have his judgment written out and signed on the petition, the appellant laid hold of it, saying, "I withdraw the petition." The sheriff thereupon told the appellant that the petition could not be withdrawn, and ordered the appellant to restore

it to the clerk ; intimating at the same time that disobedience to the order would be treated as "a contempt of court." The appellant nevertheless walked off, carrying with him the petition ; whereupon the sheriff informed the clerk that he (the clerk) would be held responsible for the recovery of the petition. The clerk, therefore, at once asked and obtained from the sheriff a process-caption against the appellant, and a sheriff's officer was despatched with it to get back the document or imprison the appellant. When the court functionary entered the appellant's office and demanded the petition, the appellant threw it into the fire. He was thereupon seized and lodged in prison, where he remained till the following day, when he was released.

The action was brought by the appellant in May, 1867, against the sheriff, the sheriff-clerk, and the sheriff-clerk-depute, concluding that the process-caption should be rescinded and annulled, and that the defenders should be 362] ordered to pay the appellant *£5,000 for damages in respect of his imprisonment. The Lord Ordinary (¹), on the 24th of November, 1870, dismissed the action, and his interlocutor was adhered to by the second division of the court below, who decided, however, on the 28th of October, 1871, that "no expenses were due to either party ;" their lordships differing in their opinions as to the issue of the process-caption without notice.

Mr. Watt appealed to the House against the judgment of the Court of Session dismissing his action. The sheriff-clerk and the sheriff-clerk-depute also presented a cross appeal, complaining that costs had not been awarded to them (²).

Mr. *John Pearson*, Q.C., and Mr. *A. Robertson*, on behalf of the appellant, contended that the document taken away in this case was not the property of the court, but the private property of the appellant ; secondly, that a process-caption was an inappropriate remedy, which at all events ought not to have been issued without prior notice to the appellant ; and thirdly, that the appellant was entitled to damages suitable to his professional status, which had been seriously affected by his imprisonment.

The *Lord Advocate* (³), and Mr. *J. T. Anderson*, who appeared for the respondents, were not called upon to reply, their lordships, at the close of the argument for the appellant, delivering the following opinions :

The LORD CHANCELLOR (⁴) : My lords, by one of the prac-

(¹) Lord Mackenzie.

(²) Mr. Gordon, Q.C.

(³) The case, as decided in the court of Session, is reported in the *Scottish Jurist*, vol. xliv., p. 241.

(⁴) Lord Cairns.

tioners in the Sheriff Court of Aberdeen an act was committed in the year 1867 which I am unable to describe in any other way than as a gross and unjustifiable contempt of court. A document, which this House has held to be part of the process depending in the court (¹), and which was clearly in *custodiâ curiæ*, was carried away by the appellant, in defiance of an express order from the judge, and after distinct intimation had been given to the appellant that if he removed *the document in question the act [363 would be, and would be treated as, a contempt of court.

On the part of the appellant it is suggested that what the court ought to have done was to issue a process-caption, with all the accompaniments by which it is ordinarily accompanied, and that he should have given notice to the appellant for a certain number of hours before, requiring him to return the document, and stating that if he did not return it, a process-caption would issue. This process-caption is a proceeding applicable to cases in which a practitioner of the court borrowing a document belonging to the court gives a receipt for it, and is under an obligation to return it when called upon. In those cases notice must be given, there being no time originally fixed for the duration of the loan; and that notice must precede any process for the purpose of enforcing the return. But, my lords, any proceeding of that kind would have been entirely inapplicable to the present case.

Well, then, what could the judge do? In my opinion, treating this as he stated he would treat it, as a contempt of court, he might have proceeded at once with the cognizance he had of the whole subject, and vindicated the dignity of the court by ordering the offender to be committed without more, leaving the contempt to be purged in the usual way. But, my lords, there were also two other courses, not differing very materially from that which I have mentioned, and each of them milder and gentler, which is described by Lord Neaves (²), who says that "it was competent to the sheriff, within whose cognizance and in whose presence the pursuer's proceedings took place, to have issued a summary order or warrant ordering the pursuer to restore the petition, of which he so took possession, and, failing his immediately restoring the same, for his immediate imprisonment till that order was implemented."

Another course, and a not very dissimilar course, would have been to order the commitment of the appellant until

(¹) Weekly Notes, 1870, p. 143; Scotch Jurist, vol. xlii., p. 475.

(²) Scottish Jurist, vol. xli., p. 241.

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he had restored the document. The practical effect of that third course would have been very much the same as that of the second. It would have given Mr. Watt, in substance, 364] the alternative of at once *restoring the document in place of going to prison. But it was the third course which the judge, through his officers, adopted.

My lords, without pursuing the case further, I only express my opinion that the judge was entirely warranted in issuing this warrant or caption, and in my opinion the dignity of the court would not have been vindicated if some proceeding of this kind had not been taken.

The case having come up to your lordships' House in a former year (1), when nothing certainly fell from any of your lordships that could have encouraged the continuance of this litigation, I greatly regret that so much time and so much money have been spent or wasted in these proceedings. Now, all that I can do is to advise your lordships to dismiss the first appeal (that of the appellant Watt) with costs, and on the cross appeal to reverse the interlocutor of the Second Division, that is, the interlocutor of the 28th of October, 1871, and in place of that to pronounce a judgment assailing the defenders (the above respondents) with expenses, and remit the case in that form back to the Court of Session.

LORD CHELMSFORD: In this case it is clear, in my opinion, that no notice or special warning of the caption was necessary.

The case was regularly before the sheriff-substitute. A petition was presented for an interdict—a *caveat* had been previously lodged which was equivalent to the appearance of the respondent upon that proceeding. The matter being before the sheriff-substitute, he heard the agents of the parties, documents were produced before him, and he came to the conclusion that no interdict ought to be granted. I think that under those circumstances the respondent was entitled to have a deliverance written upon that petition, and it appears that the sheriff handed the petition to the clerk for the purpose of having his interlocutor written upon it. At that particular point Mr. Watt said, "I withdraw the petition," and the sheriff (in his evidence), says, "When he (Mr. Watt) said *that*, I was proceeding to dictate the interlocutor." 365] *Mr. Watt then took up the petition from before the clerk. Whereupon the sheriff said, "You cannot withdraw it in that way, Mr. Watt;" but Mr. Watt persisted

(1) Weekly Notes, 1870, p. 143.

in keeping it. Then the agent on the other side said that the interlocutor had been given in his favor, and that he wished it recorded, and he objected to the withdrawal. But Mr. Watt said, "There will be no interlocutor; the petition is withdrawn." The sheriff-substitute (in his evidence) says:

Mr. Watt seemed excited, and he certainly was rude. I then said to him very seriously, "You will quite understand, Mr. Watt, that I desire the interlocutor now to be written upon the petition, and that I shall consider your preventing the clerk from doing it as a contempt of court." Mr. Watt retained possession of the petition, I think he put it into his pocket, and he immediately left the room.

Now, can there be the slightest doubt that, under these circumstances, it would have been competent to the sheriff-substitute to issue a warrant for the committal or imprisonment of Mr. Watt until he delivered back that petition? It hardly seemed to be denied in the course of the argument that the sheriff-substitute might have proceeded in that way.

But then it is said that the sheriff-substitute proceeded in an irregular way by issuing what is called a caption-process. Now the caption-process is adapted to a particular state of things, and it is regulated by an act of *sederunt* of the court. An agent may borrow a process, from the clerk, and, when he borrows it, he gives what is called a borrowing receipt. After that he is lawfully in receipt of that process until it is demanded back from him; but when it is demanded back from him, if he does not deliver it, he is then illegally in possession of the process, and this caption-process may be issued against him. Now, it occurred to me in the course of the argument, that a person who is a wrong-doer from the beginning, as Mr. Watt was upon the present occasion, who was at all times in illegal possession of the process, was exactly in the position of a person who has the process under this borrowing receipt after it is demanded from him and he refuses to deliver it. Therefore it appeared to me that this caption-process was the proper proceeding against a person who had committed this wrongful act.

It was not only a wrongful but an unprecedented act, for none of *the judges nor anybody else, ever heard of [366 anything of this kind before. Therefore the question was whether the caption-process was applicable to a new state of things. The Lord Justice Clerk was of opinion that this caption process might properly be issued under the circumstances; but perhaps the opinion of the Lord Ordinary is so tersely and so well expressed, that I may as well refer to it. He says:

The pursuer further maintains, that the process-caption was illegally and incompetently granted for recovery of the petition, because he had never borrowed it or

granted a borrowing receipt for it. It cannot surely be maintained that although a warrant or caption for the recovery of a process may be issued against an agent who has legally and in ordinary form borrowed it from the sheriff-clerk and granted the usual receipt for its return, and has failed to return it when required, yet that a warrant or caption cannot be issued against an agent for recovery of a process which he has illegally and improperly carried away. Such a proposition is, it is thought, wholly untenable.

Now, I do not think there is any magic in the term "caption-process;" but, most unquestionably, the process itself was such that the sheriff-substitute had an undoubted right to issue it, to compel the delivery of that document, and Mr. Watt might have saved himself from imprisonment by delivering back the document. He knew perfectly well what the officer had come for. He had pretty good notice that he had come to demand back that document, and the officer could not have demanded it without having proper authority for doing so, which proper authority was the warrant with which he was entrusted. But Mr. Watt put the document in the fire. I think there can be no excuse whatever for his conduct. I quite agree with my noble and learned friend with regard to the mode in which he purposes to dispose of that part of the case, and I think that Mr. Watt ought to be made to pay the expenses.

Perhaps I ought to say a word, but only a word, with regard to Mr. Ligertwood being joined in these proceedings. It is said that he is answerable for the acts of Mr. Daniel, his depute⁽¹⁾, and that is founded upon the commission which he received, which says that he is, amongst other things, to do everything concerning the premises which any 367] sheriff-clerk may lawfully do. He has power *also to appoint deputies in the said office, for whom he shall be answerable. What is his deputy to do? He is to do what the sheriff-clerk may do, that is to say, what he may lawfully do. This is alleged to be an illegal act on the part of the deputy, yet although he is only the deputy to do what the sheriff-clerk may lawfully do, it is argued that the sheriff-clerk is answerable for his unlawful acts. That is all that is necessary to be said. I do not think that Mr. Ligertwood ought to have been joined in this action at all, and I entirely agree in the conclusion at which my noble and learned friend has arrived.

LORD SELBORNE: My lords, I also agree entirely with the motion of my noble and learned friend on the woolsack. It is some satisfaction, in a case depending upon the practice of the Scotch courts, to know that your lordships are only affirming the opinion of the Lord Justice Clerk and the Lord

(1) Mr. Ligertwood, the sheriff-clerk, had Mr. Daniel for his sheriff-clerk-depute.

Ordinary; the two opinions which differed from them being, in some respects, I think, not absolutely consistent with each other ⁽¹⁾.

Mr. Watt's appeal dismissed with costs. Respondents assolized with expenses, and cause remitted back to the Court of Session to proceed accordingly.

Agent for the appellant: *James Dodds.*

Agent for the respondent: *Burcells.*

(1) Lord Selborne, in the course of the argument as to notice, referred to the case of Chief Justice Gascoigne, who, without a moment's hesitation, and without any prior notification, sent the Prince of Wales instantly to the Fleet Prison for

a contempt of court committed *in praesentia*; the heir of the Crown submitting patiently to the sentence, and making reparation for his error by acknowledging it.

CASES

IN THE

PRIVY COUNCIL.

[Law Reports, 5 Privy Council Cases, 394.]

J.C.,* Feb. 6, 7, 11, 12, 13; March 14, 1874.

394] *ARCHIBALD F. MACKAY and DANIEL MACKAY, Appellants; and THE PRESIDENT, DIRECTORS, and COMPANY of the COMMERCIAL BANK of NEW BRUNSWICK, ALEXANDER McLEOD SEELY, WILLIAM PARKS, SOLOMON HERSEY, and JAMES VERNON, Respondents.

ON APPEAL FROM HER BRITANNIC MAJESTY'S SUPREME COURT OF NEW BRUNSWICK.

Agent—Misrepresentation—Liability of Principal.

A master is answerable for every such wrong of his servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved; and there is no distinction between the case of fraud and the case of any other wrong.

Where one party has suffered, and another has profited by, the fraudulent representation of an agent of the latter made within the scope of his authority, the former is entitled to recover damages.

An action of deceit may be maintained against a company, whether incorporated or not incorporated, in respect of the fraud of its agent.

An officer of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but without the knowledge of the president or directors of the bank, made a representation to A. which, by omitting a material fact, misled A., and induced him to accept a bill in which the bank was interested; and A. was compelled to pay the bill:

Held, that A. could recover from the bank the amount so paid.

In an action of deceit, whether against a person or against a company, the fraud of the agent may be treated for the purposes of pleading as that of the principal.

The case of *Western Bank of Scotland v. Addie* (1) distinguished from *Barwick v. English Joint Stock Bank* (2).

Dicta of Lord Chelmsford and Lord Cranworth, in the case of *Western Bank of Scotland v. Addie* (1), observed upon.

The Judicial Committee are unwilling to send a case for re-trial, or to decide it, upon points which have been raised for the first time at their bar, and which possibly may have been treated as agreed upon, or too clear for argument, in the court below.

THE following were the material facts in this case:

The appellants were merchants residing at Liverpool, and 395] for *several years had been in the habit of receiving

**Present*: SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(1) Law Rep., 1 H. L., Sc. 145.

(2) Law Rep., 2 Ex., 259.

shipments of deals from Bartlett Lingley, a timber merchant, of St. John, New Brunswick, to sell on commission; he drawing bills upon them in favor of an incorporated bank called the Commercial Bank. During the year 1867-8, Lingley had given the bank accommodation in the form of bills drawn on the appellants, the payment of which the bank undertook to guarantee. On the 16th of June, 1868, Lingley drew upon the appellants, and indorsed to the bank, several bills of exchange against cargoes shipped, and two bills for £1,000 each on general account, which would fall due on the 2d of September. The bank guaranteed the payment of these two at maturity; their guarantee was sent to the appellants by Lingley, when he advised them of the drawing of the bills; the bills were accepted by the appellants, and negotiated by the bank through their agents, Glyn, Mills & Co., of London.

By the mail, which left St. John for England on the 11th of August, 1868, Lingley wrote to the appellants that he had drawn upon them in favor of the bank seven bills of exchange, purporting to be on account of cargoes of deals.

This letter reached Liverpool on the 24th of August; the bills had been sent by the bank by the same mail to Glyn, Mills & Co., in London, and would probably be presented to the plaintiffs for acceptance within a few days. No remittance having been sent by the mail of the 11th of August to take up the bills guaranteed by the bank on the 16th of June, and falling due on the 2d of September, the appellants, on the 24th of August, sent the following telegram to Lingley in St. John: "If not remitted guarantee two due second September, will refuse all advised eleventh." This telegram was received in St. John at 10:30 a. m. on the same day; several days before this Lingley had become insolvent and left the country, having assigned all his property to his brother, Lewis Lingley, and one J. Travis, in trust for the benefit of his creditors. Lewis Lingley received the appellants' telegram, took it to the Commercial Bank and showed it to Sancton, the cashier, who asked him to leave it for a short time; he left it at the bank for about an hour, when he called and got it again; about twelve o'clock the same day (the 24th of August), the messenger of the bank, whose *business it was to deliver letters, telegrams, &c., took [396 to the telegraph office in St. John a paper or telegraphic message in the following words:

"To Mackays, Liverpool.—Sent last mail.—Lingley."

This was forwarded to the appellants at Liverpool, and was received by them on the evening of the same day. This

paper, sent from the bank to the telegraph office, was in the handwriting of Travis. The messenger stated (when examined as a witness) that he got it either from the cashier or the president of the bank, he could not recollect which; the charge for sending it to Liverpool (\$25) was paid at the time the paper was delivered at the telegraph office. This sum was charged against Lingley in the books of the bank on that day, thus: "Telegraph to Mackay, Liverpool, \$25."

The clerk who paid the money and made the entry stated that he would not have done so without authority, and he thought it was done by the direction of Sancton.

Before and at the time when this telegram was sent to the appellants, Lingley's trust deed had been awaiting execution by the bank, and it was executed on the afternoon of the 24th of August, a meeting of the directors having been held on that day relative to their transactions with Lingley, who was largely indebted to the bank. By the trust deed the bank received certain property from Lingley and released him from all liability. The bills drawn on the appellants on the 11th of August were presented to them on the 25th, the day after the receipt of the telegram from St. John, and accepted by them.

For two of these bills, one for £300 and the other for £1,250, no cargoes were sent, and the appellants were obliged to pay them.

The appellants afterwards brought an action on the case, in the nature of deceit, against the bank, joining two of the directors as defendants. The declaration concluded with the statement that the telegram addressed by the appellants on the 24th of August, 1868, to Lingley, came into the possession of the defendants (now respondents), and that "the defendants, well knowing that Lingley had left St. John, but intending to deceive the plaintiffs, and to induce them by false pretences to accept the said bills of exchange so presented, and to induce the plaintiffs to believe that the 397] *message thereafter mentioned was sent by Lingley, falsely and fraudulently forwarded by the Atlantic telegraph cable a certain message, purporting to be a reply to the said message sent by the plaintiffs, which message or reply was in the following words: 'Mackays, Liverpool; sent last mail, Lingley;' and purporting to be sent by the said B. Lingley; whereas, in fact, Lingley was not then in St. John, nor even received the first-mentioned message, or made any reply thereto: all which said premises were well known to the defendants. That the plaintiffs afterwards, on the 25th of August, in the year aforesaid, at Liverpool, received the

said telegram so sent by the defendants, and relying upon and confiding in the truth and genuineness thereof, and believing that it had been sent by Lingley, were thereby induced, and did accept the said bills of exchange so presented to them, amounting to the sum of £20,000, which, but for the receipt of the said telegram, and believing in its genuineness, they, the plaintiffs, otherwise would not have done. That afterwards, on the 28th of November in the same year, when the said bills of exchange, so accepted, became due and payable, the plaintiffs were unable to pay the same, and the defendants did not provide the plaintiffs with funds to retire the same, but wholly neglected and refused so to do; and the plaintiffs, by means thereof, and by reason of accepting the said bills of exchange, were obliged to and did suspend payment, and compromised with their creditors, and thereby their business as merchants and their credit and standing were greatly injured and destroyed, and they otherwise sustained great damage."

The case came on for trial before Mr. Justice Weldon.

There was conflicting evidence as to whether the telegram was sent to the appellants by order of the directors of the bank.

The following passages occur in the learned judge's charge to the jury:

"The words of the telegram are true so far as concerns remittances having gone forward by the mail preceding the 24th of August, but false as purporting to come from Lingley. The bank knew Lingley could not send such a telegram, as he had absconded from the province several days before, and the law will infer an improper motive if the telegram is false within the knowledge of the bank and sent for a purpose which, being acted upon *by the plaintiffs, [398 has occasioned, or will occasion, damage to them. It may be said that everything stated in the telegram is literally true, and so it was, but the objection to it is not that it does not state the truth so far as it goes, but that it conceals most material facts with which the plaintiffs ought to have been made acquainted, the very concealment of which gives to the truth the character of falsehood. . . .

"The ground of this action is the intention to deceive and injure the plaintiffs, and in this, as in all other questions of *mala fides*, the jury are to judge.

"The first question that arises, is as to the bank as a corporation, whether this action is maintainable against it?

"The tendency of modern decisions has been to make

corporations civilly as well as criminally liable as individuals.

"It has been held that they may be sued in trespass and trover, and for other acts which work injuries to parties, but not for acts of criminality. It would in my opinion be an absurdity to hold, that if a man draws another into a snare, that the party should have no remedy by action. An action on the case for deceit is an action well known to the law, although not of frequent occurrence; and I cannot agree with the learned counsel for the defendants that such an action will not lie against the bank, because it is *ultra vires* of their charter. I am of the opinion that the bank may, by their officials, make representations, and that the principle that fraud consists as well in the suppression of what is true as the suggestion of what is false applies to them; and may not the bank do this or adopt a statement made by their officers as well as individuals? I am of the opinion that they are equally liable. The next point is whether Sancton had authority to bind the bank corporation by sending the telegram, supposing you are satisfied from the evidence that he did send it? It is not, I believe, contended that if the president had sent it, that he would have been authorized, yet his act would have bound the company.

"As to the cashier Sancton sending it, I am not prepared to say that it did not belong to him to conduct the financial arrangements and correspondence of the bank, unless authorized to do so; but let us see what the president of the 399] bank, McLaughlin, says *Sancton did. 'He kept the books, conducted the correspondence, and prepared the telegrams. I did not know of \$25 being paid by the bank for this telegram. Sancton would give directions to pay for telegrams sent for the bank. The trust deed of Lingley was signed after Lingley left. The trustees told us that he had left and was hopelessly insolvent. Sancton was a good business man and we acted on what he said. I did understand from Lewis Lingley that unless funds went forward the bills of the 11th of August would not be accepted. I think I heard of it after the trust deed was signed. I found that guarantees were given to Mackay; when I came in as president it was handed down to me; the object of guarantee was to obtain funds. Sancton was the man that arranged the financial matters of the bank; he was the "Wind-raiser." As a director I knew of this mode of raising money before I became president. It would not be for the benefit of the bank to be known. All was done through Sancton. I did not ordinarily give directions. All persons

about the bank took their orders from Sancton. It was understood that such guarantees should be done; when it was done he would bring it before us. It was in the letter-book. I have read the letters. They were always open; Sancton knew the object. I remember the 17th of June. I remember this letter of June 24th raising £7,000; it was of importance to the bank. Sancton told me all the transactions of the bank. I cannot account for Lingley being charged \$25 on the 24th of August. He was not here on that day. I never knew of the bank charging for a telegram which they did not send.'

"This is the evidence of the president, which shows that Sancton conducted all the correspondence of the bank. Whatever might be the president's duty, it was discharged by Sancton, and the president and directors left it with him. We find it also by the correspondence of the bank. Then we find that remittances to retire the bills of June 16th have not gone forward to retire the £2,000 of bills mentioned therein, maturing on September 2d. Mackays send a telegram to Lingley on the 24th of August, to inform him that unless £2,000 due the 2d of September were remitted for (these were the sixty-day bills mentioned in the letter) all bills advised on the 11th of August will be refused. Herefrom the course of dealings between the bank, *Ling- [400 ley, and Mackay is mixed up ('). Money matters, bills of exchange, in which the Commercial Bank had been incorporated to deal and carry on business; who was to look after these things for the bank? Were the president and directors to do so, or was it their accredited officer, the cashier, that they recognized as empowered to do this? It would seem by the correspondence that Sancton, the cashier, was the sole person. We see the letters addressed to the president, proposing the terms upon which Lingley draws bills for the accommodation of the bank on Mackays answered by being 'accepted' or 'approved' by Sancton, as cashier, alone, neither president nor directors affirming them. Can there be a reasonable doubt that this was known to the president and directors? If it was not known, it should and ought to have been known, and they had the means of knowing; and if they were ignorant of such large sums being obtained from Lingley for the accommodation of the bank, and which the bank had to provide funds to retire, it would be strong evidence that the president and directors had vested in Sancton, the cashier, the authority to transact

(1) The record is somewhat confused here, but the meaning seems to be as printed above.

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Mackay v. Commercial Bank of New Brunswick.

J.C.

with Lingley and Mackay the monetary business of the bank, which properly belonged to the president and directors; and therefore, upon general principles, when a general authority was given to Sancton, as is shown by the letters and acts of the bank, this implies a right to do all subordinate acts incident to and necessary to carrying out the arrangements which it was incumbent upon the bank to do. This corresponds with the president's statement, which is uncontradicted. I am of the opinion that Sancton was their agent. I consider the bank was interested in the exchange which had gone forward, so that Sancton might be considered as authorized by the bank to act in the matter, and for his acts the bank would be liable. Then we find from the evidence of Mr. Gardiner, the confidential clerk of the plaintiffs at Liverpool, on the 24th of August, 1868, that on that day the plaintiffs received their letters from St. John, but no remittances to retire Lingley's bills guaranteed by the bank, falling due on the 2d of September, and that bills for £3,750, drawn by Lingley in favor of the bank, which had 401] been sent to Glyn, Mills & Co., the bank's *agents, by that mail, would be presented next day. They telegraphed Lingley, as they had been accustomed to do, as follows:

“ ‘Per cable, 24th August, 1868.

“ ‘Mackays, Liverpool, to Lingley, St. John, N. B.

“ ‘If not remitted guarantee two due second September, will refuse all advised eleventh.

“ ‘Reply quickly.’

“This telegram is received at St. John by Lewis Lingley, who was one of the trustees of Bartlett Lingley, about ten o'clock. He knowing what it meant, and the interest the bank had in the bills, after consultation with his co-trustee Travis, took this telegram to Sancton, the cashier, and delivered it to him in his room at the bank. He leaves the telegram there by the desire of Sancton, and before twelve o'clock calls and receives it back; in ten minutes past twelve an answer is brought to the telegraph office and handed to Clinch, the superintendent, who knew of the telegram and that it required an answer. This answer was delivered to him by Harrison, the messenger of the bank:

“ ‘24th August.

“ ‘Lingley to Mackay.—Sent last mail.—Lingley.’

and he pays \$25 for it. The messenger of the bank says he got it from the cashier or president; there is no doubt of this. The fraud which the plaintiffs complain of is, that the

bank sent an answer to the telegram forwarded to Lingley, leading the plaintiffs to believe that B. Lingley had sent it, when in fact he was not in the country; and they say and prove that in consequence of that telegram they accepted bills drawn by Lingley in favor of the bank for £3,750, which they would not have done if the telegram, falsely purporting to come from Lingley, and which they had no means of knowing was untrue, had not been sent.

"The question, therefore, which I submit for your consideration is this: Was the telegram to Mackays, purporting to come from Lingley and delivered by the messenger of the bank to the telegraph office on the 24th of August, 1868, sent by the cashier or president to Mackays with the intention of inducing them to accept the bills advised in the letter of August 11th, and were those bills accepted by Mackays in consequence of that telegram? *If you find this in [402 the affirmative it was a fraud in law. This is for you to find. You find the fact. The question of the intention is found by you, and I pronounce, in law, the fact so found by you to be fraud, a legal fraud, which renders the bank liable. There being no evidence to fix Seely and Vernon personally, your verdict will be for them. As to damages, if you find for the plaintiffs I am of the opinion that the bills for £1,250 and £350 (') which they accepted, and for which they received no payment, are the measure of damages."

The jury found a verdict for the plaintiffs against the said bank only, for the sum of \$8,488.

In Hilary Term, 1871, a rule was obtained on behalf of the said bank in the said Supreme Court, pursuant to leave reserved at the trial, calling on the plaintiffs to show cause why the said verdict should not be set aside and a nonsuit entered, or why a new trial should not be granted; and the said rule was, in Hilary Term, 1872, made absolute for a new trial. The appellant thereupon applied for, and obtained from the said Supreme Court, leave to appeal to Her Majesty in Council.

The appeal now came on to be heard.

Mr. *Benjamin*, Q.C., and Mr. *Anstie*, for the appellants: The bank, of course, did not authorize Sancton to commit a fraud, but it entrusted him with the conduct of this class of business, and he conducted it unfairly, and committed the fraud in the course of his employment. The bank would not have been liable if he had committed fraud while he was not doing the business entrusted to him. It was important

(') A mistake for £300.

for the bank to get the bills accepted by the appellants. The majority of the judges were misled by the consideration that Sancton had not been authorized to do what he did; but if he was doing the principal's business at the time, the principal is responsible. They failed to distinguish between authority to commit a fraudulent act and authority to transact the business in the course of which the fraudulent act was committed.

The appellants are entitled to retain their verdict if they have sustained damage from the fraudulent representation 403] of an agent *of the defendants made within the scope of his authority, even if the defendants did not profit thereby. The plaintiffs are entitled, even supposing the representation of Sancton not to have been within the scope of his authority, if the defendants accepted the benefit of that representation with notice of the fraud: *In re Cork and Youghal Railway Company* (*). There is a concurrence of all the circumstances that make the bank responsible; the fraud was committed by their servant in the ordinary course of his employment, and they have knowingly taken the benefit of it.

The evidence shows that some of the bank officers besides Sancton were privy to the fraud, and after the bank knew of the fraud it exacted payment of the bills. Lingley was raising money for the bank by his bills, and when the telegram was sent it had released, or was intending to release him. When his composition deed was executed the bank was the only party interested in procuring the acceptance of the bills, and it paid them to Glyn & Co. on its own account. Glyn & Co. thereby became holders for value without notice, whose claim on the bills the appellants could not resist, and therefore they were obliged to come to an arrangement with Glyn & Co. It was not questioned in the court below that Glyn & Co. were holders for value. The telegram was false in this respect,—that it conveyed to the appellants the belief that Lingley was still present and carrying on his business at New Brunswick, when in fact he was insolvent and had absconded, and this false statement induced the appellants to accept the bills. The case of *Barwick v. The English Joint Stock Bank* (†) lays down the law fully and governs this case. The act which constituted the fraud was committed by Sancton on behalf of the bank, and for the purpose of getting money for the bank, and the test is, shall the principal take advantage of the fraud?

In *Western Bank of Scotland v. Addie* (‡) a new corpora-

(*) Law Rep., 4 Ch., 748. (†) Law Rep., 2 Ex., 259. (‡) Law Rep., 1 H. L., Sc., 145.

tion had been formed with the concurrence of the appellant, and it was held that he could not recover against the new company in respect of his claim against the old company for misrepresentation by its directors. The decision is not inconsistent with the case of *Barwick v. English Joint [404 Stock Bank* (1), though some of the *dicta* of Lord Chelmsford and Lord Cranworth are questionable. *Swift v. Winterbotham* (2) has been reversed in the Exchequer Chamber, but on grounds which do not affect the general doctrine on which it was decided. A master is liable for all misfeasance of his servant committed in the course of the business in which his master employs him, though not if the servant wilfully gets into mischief on his own account: *Limpus v. London General Omnibus Company* (3). In *Ranger v. Great Western Railway Company* (4) it was laid down by Lord Cranworth that a corporation is liable if its agent commits a fraud, as an individual would be in the like case. The judge put to the jury every controverted question, not questions which were not contested before him. Our pleadings in the court below may be inartificial, but the substance is that we have been damnified, and the bank has had the benefit of it. The benefit cannot be retained and the liability disclaimed.

It may be that a person cannot ratify an act which was not professedly done on his behalf, but if he takes the benefit of such act he is estopped from repudiating the authority. We cannot recover consequential damages, for the party sued had no *mens rea*, but we claim the amount which the principal has received through the fraud of his agent. The declaration is correct, but claims too much. The respondents did not deny that we had paid, but we claimed special damage which we cannot recover. The summing-up took exactly that view of the law.

[The appellant's counsel also referred to *Udell v. Ather-ton* (5); and *Rees River Silver Mining Company v. Smith* (6).]

Mr. Butt, Q. C., and Mr. Cohen, Q. C., for the respondents: The communication of the appellants was not addressed to the bank, and it was not in the usual or necessary course of the bank's business to answer such communications. In *Poulton v. South Western Railway Company* (7) the station master did an act which he had no authority to do, and it was held that his principal *was not liable, as he had [405

(1) Law Rep., 2 Ex., 259.

(2) Law Rep., 8 Q. B., 244.

(3) 32 L. J. (Ex.), 34.

(4) Law Rep., 5 H. L., 88.

(5) 7 H. & N., 172; 30 L. J. (Ex.), 817.

(6) Law Rep., 4 H. L., 64.

(7) Law Rep., 2 Q. B., 534.

only given authority to do things right and proper. It is otherwise where the act, though wrongly done, is within the scope of the authority given to the agent: *Goff v. Great Northern Railway Company* (*); *Seymour v. Greenwood* (*); *Limpus v. General Omnibus Company* (*); *In re Cork and Youghall Railway Company* (*).

The message purported to come from Lingley, so the appellants cannot say they were misled by giving credit to the bank.

Ratification can only be when one person has professed to act for another. Here Sancton did not profess to act for the bank: *Wilson v. Tumman* (*); *Eastern Counties Railway v. Brown* (*).

There can be no action for deceit where there has not been falsehood. Moral fraud is essential: *Burley v. Walford* (*); *Way v. Dickson* (*). The cases are collected in a note to 2 Smith's Leading Cases [8th Ed.], p. 92.

There is no rule that the principal having received benefit must return it.

If a ship master at an English port, where the shipowner resides, orders supplies for the ship on bottomry bond, and consumes them accordingly, the owner is not held liable; and so where money is borrowed to pay towage, but without authority: *Arthur v. Barton* (*); *Beldon v. Campbell* (*). If a stranger had done what Sancton did, and the same events had followed, the bank would not have been liable on an action of deceit or any other proceeding.

There can be no action against a corporation for fraud and deceit. A corporation is created for certain purposes only. A private partnership may extend its business, but a corporation is limited to its professed objects.

We rely on *Western Bank of Scotland v. Addie* (*). The doctrines laid down by the judges in that case were necessary for the decision of the case, and if they do not agree 406] with the case of **Barwick v. English Joint Stock Bank* (*), which was decided about the same time, the doctrine of *Western Bank of Scotland v. Addie* ought to prevail. That doctrine is stated in *Benjamin's Treatise on the Contract of Sale* [2d Ed.], p. 371. The case of *Swift v.*

(1) 30 L. J. (Q.B.), 148; 3 E. & E., 672.

(2) 30 L. J. (Ex.), p. 329; 7 H. & N., 858.

(3) 32 L. J. (Ex.), 34; 1 H. & C., 528.

(4) Law Rep., 4 Ch., 948.

(5) 6 M. & G., 236.

(6) 6 Ex., 326.

(7) 9 Q. B., 197.

(8) 12 H. L., 605.

(9) 6 M. & W., 138.

(10) 6 Ex., 886.

(11) Law Rep., 1 H. L., Sc. 145.

(12) Law Rep., 2 Ex., 259.

Winterbotham (¹) has been overruled in the Exchequer Chamber.

This action is brought in tort because the plaintiff knew he could not recover in contract. There can be no rescission here, and consequently no recouping. The bank did not know of any fraud at the time when the appellants were induced to accept the bills. There is no evidence of general damage.

The appellants cannot be allowed now to amend the pleadings so as to make a new case. We have got an order for a new trial, and there is no cross appeal. The proper questions were not left to the jury.

Sancton was not authorized by the directors to send the telegram. The appellants have not proved that they paid the bills. If they did pay them, they paid them voluntarily, and with knowledge of the fraud, in which case they cannot recover.

The judgment of their lordships was delivered by

SIR MONTAGUE E. SMITH : The most material facts in this case may be thus stated : Mr. Lingley, a timber merchant, of St. John, New Brunswick, had for some years before June, 1868, been in the habit of consigning cargoes of deals to the Messrs. Mackay (the plaintiffs), who are timber brokers in Liverpool, and of drawing bills upon them, which he indorsed to the defendants, who are an incorporated bank, carrying on business at St. John ; he also from time to time drew upon the plaintiffs bills for the accommodation of the bank, for the payment of which the bank sometimes gave guarantees to the plaintiffs.

On the 16th of June, 1868, Lingley advised the plaintiffs of several bills which he had drawn upon them, of which two of £1,000 each, falling due on the 2d of September, 1868, were guaranteed by the bank, who were to transmit funds to meet them before their maturity. In this state of circumstances Lingley *wrote to the plaintiffs on the 11th of [407 August, 1868, advising them of several fresh bills, due on the 26th of November, which he had drawn upon them and indorsed to the bank to the amount of £7,750, all of them, as he stated, against cargoes, but of which two, of £1,250 and £300 respectively, were not in fact drawn against cargoes. This letter of Lingley's was received by the plaintiffs on the 24th of August, 1868, whereupon they sent to Lingley the following telegram :

“Mackays, Liverpool, to Lingley, St. John, New Bruns-

(¹) 8 Q. B., 244.

wick.—If not remitted guarantee two due 2d September will refuse all advised eleventh. Reply quickly.”

The message arrived at St. John on the same day. Lingley had then absconded, having on the 18th of August executed a deed conveying all his property to trustees, to which deed, releasing Lingley from all liabilities to the bank, the president and cashier of the bank were parties. The telegram was taken to the bank by Lingley's brother, whereupon Sancton, the cashier, answered it in these terms:

“To Mackays, Liverpool.—Sent last mail.—Lingley.”

It must be assumed that neither the president of the bank nor its directors instructed Sancton to send this telegram, or knew of its having been sent till long afterwards. The plaintiffs' case was that, although the statement “sent last mail” (which must be taken to mean that remittances had been sent to meet the guaranteed bills falling due on the 2d of September) was true, yet that the telegram was fraudulently sent in the name of Lingley, and conveyed, and was intended to convey, to them a false representation that Lingley was still in St. John's, and carrying on his business, whereas he had become insolvent and had absconded; that, acting on the faith of this representation, they accepted the bills, which they would not have done had they known the truth; that they had to pay the bills, of which payment the bank, who indorsed and remitted them to Messrs. Glyn on their own account, obtained the benefit. The action was what is commonly called an action of deceit, in which the plaintiffs stated the false representation as that of the bank; 408] and there was an allegation of special *damage in the shape of injury to their credit, coupled, however, with an allegation of general damage, under which it would be open for them to claim as damage payment of the bills. Two of the directors of the bank, Seely and Vernon, were joined as defendants, but, as they obtained a verdict, no question as to them arises. The defendants pleaded not guilty.

The case was tried before Mr. Justice Weldon and a jury. It appeared by the evidence of the president of the bank, the defendants' witness (referred to in his summing-up by Mr. Justice Weldon), that Sancton had a far wider authority than a cashier would be presumed to have in this country. The president says: “He kept the books, conducted the correspondence, and prepared the telegrams. . . . Sancton would give directions to pay for telegrams sent for the bank. . . . Sancton was the man who arranged the financial matters of the bank; he was the ‘Wind-raiser.’ As a direc-

tor, I knew of this mode of raising money before I became president. It would not be for the benefit of the bank to be known. All was done through Sancton. I did not ordinarily give directions. All persons throughout the bank took their orders from Sancton."

Mr. Justice Weldon must be taken to have directed the jury that the sending of the telegram was within the scope of the authority of Sancton: by his note it appears that he directed them further to this effect: "The question which I submit for your consideration is this, was the telegram from Mackays, purporting to come from Lingley, and delivered by the messenger of the bank to the telegraph office on the 24th of August, 1868, sent by the cashier or president to Mackays with the intention of inducing them to accept the bills advised in the letter of the 11th of August, and were these bills accepted by Mackays in consequence of that telegram? If you find this in the affirmative it was a fraud in law, that is for you to find—you find the fact. The question of the intention is found by you, and I pronounce in law the fact so found by you to be a fraud, a legal fraud which renders the bank liable. As to damages, if you find for the plaintiffs, I am of opinion that the bills for the £1,250 and £350 (a mistake for £300), which they accepted, and for which they received no payment, are the measure of damages."

*The jury found a verdict for the plaintiffs for the [209 full amount of the bills.

A motion was made for a nonsuit, in pursuance of leave reserved, or for a new trial. A rule for the latter was granted and made absolute by the Supreme Court, consisting of Mr. Justice Allen, Mr. Justice Fisher, and Mr. Justice Weldon; Mr. Justice Weldon, however, adhering to the view which he had expressed at the trial. Mr. Justice Allen, who gave judgment on behalf of Mr. Justice Fisher and himself, thus states the grounds on which the rule was made absolute—"on the ground of misdirection as to the matter being within the scope of the cashier's duties, and in not leaving to the jury whether Sancton was authorized by the directors to send the telegram."

It has been contended at their lordship's bar, that there are other grounds on which a new trial should have been directed, or judgment given for the defendants, viz., (1) that the plaintiffs have not proved that they paid the bills, and (2) that if they did pay them they paid them voluntarily with knowledge of the fraud, in which case they cannot recover.

Their lordships have carefully examined the somewhat full note taken by Mr. Justice Weldon of the points raised at the trial, and can find no trace of any such points; nor do the numerous "reasons" which have been prepared in the colony on behalf of respondents contain any reference to the second point, or indeed to the first, beyond a general complaint of the judge's ruling on the questions of damages. Mr. Justice Allen, in giving the judgment of the High Court, thus expresses himself: "For two of the bills, one for £300 and the other for £1,250, no cargoes were sent, and the plaintiffs *were obliged to pay them*," thus treating the payment of them by the plaintiffs under compulsion as an unquestioned fact, instead of sending it to be re-tried, as he presumably would have done, if there had been a misdirection or an unsatisfactory finding upon it. Their lordships are always extremely loth to send a case for re-trial, much more to decide it upon points which appear to have been raised for the first time at their bar, and which possibly may have been treated as agreed upon or too clear for argument by the court below. It is enough to say that the Supreme Court having assumed (without apparently a contradiction) *on the subject) that the plaintiffs were compelled to pay the bills, their lordships are not satisfied that this assumption was unwarrantable. Their lordships further assume, as appears to have been assumed in the court below, that the defendants obtained the benefit of these payments in their account with the Messrs. Glyn.

This being so, the points for consideration are confined to those stated by the judgment of the Supreme Court as the grounds on which the new trial was directed.

The court appear to treat the question whether or not Sancton was acting within the scope of his authority (there being no conflicting evidence as to the general nature of his authority) as a question of law, and hold that Mr. Justice Weldon, instead of directing the jury that the sending of the telegram was within the scope of Sancton's authority, ought to have directed them that it was not. The only question of fact which they direct to be submitted to the jury is, whether or not the sending it was sanctioned by the directors.

Their lordships regard it as settled law that a principal is answerable where he has received a benefit from the fraud of his agent, acting within the scope of his authority. This doctrine has been laid down by Lord Holt in *Hern v. Nichols* ⁽¹⁾, by Lord Ellenborough in *Alexander v. Gibson* ⁽²⁾, by

⁽¹⁾ 1 Salk., 289.

⁽²⁾ 2 Camp., 555.

Parke, B., in *Cornfoot v. Fowke* (*), although, under the peculiar circumstances of that case, he held the defendant not liable; also by Parke, B., in *Moen v. Heyworth* (*); by Tindal, C.J., delivering the judgment of the Exchequer Chamber in *Wilson v. Fuller* (*); and again by the Court of Exchequer in *Udell v. Atherton* (*), where, it is true, the court was divided in its judgment, but where Baron Martin, who held that the plaintiff had not proved his case, stated the question to be, "Was the agent's situation such as to bring the representation he made within the scope of his authority?"

There are, however, some cases to be found apparently at variance as to the interpretation and the adaptation to circumstances of this doctrine. It is seldom possible to prove that the fraudulent act *complained of was committed [411] by the express authority of the principal, or that he gave his agent general authority to commit wrongs or frauds. Indeed it may be generally assumed that, in mercantile transactions, principals do not authorize their agents to act wrongfully, and consequently that frauds are beyond "the scope of the agents' authority" in the narrowest sense of which the expression admits. But so narrow a sense would have the effect of enabling principals largely to avail themselves of the frauds of their agents, without suffering losses or incurring liabilities on account of them, and would be opposed as much to justice as to authority. A wider construction has been put upon the words. Principals have been held liable for frauds when it has not been proved that they authorized the particular fraud complained of or gave a general authority to commit frauds: at the same time, it is not easy to define with precision the extent to which this liability has been carried. The best definition of it, in their lordships' judgment, is to be found in the case of *Barwick v. English Joint Stock Bank* (*), when the judgment of the Exchequer Chamber was delivered by one of the most learned judges who ever sat in Westminster Hall. In that case the plaintiff was induced to continue to supply oats to a customer of the bank, a contractor with the government, on a guarantee from its manager to the effect that the customer's check in the plaintiff's favor, in payment for the oats supplied, should be paid on receipt of the government money, in priority to any other payment "except to this bank." The manager fraudulently concealed from the plain-

(*) 6 M. & W., 373.

(*) 10 M. & W., 157.

(*) 3 Q. B., 77.

(*) 7 H. & N., 172; 30 L. J. (Ex.), 817.

(*) Law Rep., 2 Ex., 259.

tiff that the customer was indebted to the bank in £12,000: the result was that the plaintiff was induced to advance money to the customer on a guarantee which turned out to be worthless, and which the manager must have known to have been worthless when he gave it. The declaration contained, among other counts, one for deceit, in which the fraud of the manager was laid as the fraud of the bank, on which count alone the judgment is based. Baron Martin having directed a nonsuit, a *venire de nobis* was ordered by the Exchequer Chamber, whose judgment was delivered by Mr. Justice Willes. He expressed himself as follows:—“With respect to the question whether a principal is answerable for the act of his agent in the course of his master’s business, and for his master’s benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master’s benefit, though no express command or privity of the master be proved. The principle is acted upon every day in running-down cases. It has been applied also to direct trespass to goods.” After enumerating other instances of its application, he proceeds:—“In all these cases it may be said, as it was said here, that the master had not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in.”

He further lays down, “If a man is answerable for the wrong of another, whether it be fraud or other wrong, it may be described in pleading as the fraud of the person who is sought to be made answerable in the action.”

This doctrine was acted upon lately by the Court of Queen’s Bench, in *Swift v. Winterbotham* (¹), where they held a banking company liable in respect of a fraudulent guarantee by their manager of the solvency of a person, although the bank derived no benefit from this representation. This judgment was, indeed, reversed in the Exchequer Chamber, on the ground that the signature of the manager was not the signature of the company within the words of the 9 Geo. 4, c. 14, s. 6, and that the representation was made by the manager only in his individual capacity; but Lord Coleridge in delivering the judgment observes: “This does not at all conflict with the case of *Barwick v.*

(¹) Law Rep., 8 Q. B. p. 244.

English Joint Stock Bank ⁽¹⁾, and cases of that description, because there can be no doubt that where an agent of a corporation, or a joint stock company, in conducting its business does something of which the joint stock company take advantage and by which they profit, or by which they may profit, and it turns out that the act which is so done by their agent is a fraudulent act, justice points out, and authority supports justice in maintaining, that they cannot afterwards *repudiate the agency, and say that the act which has [413 been done by the agent is not an act for which they are liable.”

It has been contended, however, that *Western Bank of Scotland v. Addie*, decided in the House of Lords about the same time ⁽²⁾, is at variance with *Barwick v. English Joint Stock Bank* ⁽¹⁾. Their lordships, however, do not so regard it.

Mr. Addie alleged that he had been induced to take shares in the Western Bank of Scotland by fraudulent representations of its directors, and claimed to recover the value of his shares, or to be reimbursed the damages which he had sustained. After his purchase of the shares and before he instituted his suit, the bank, which had been an unincorporated company under 7 Geo. 4, c. 67, was with his concurrence incorporated and registered under the Joint Stock Companies Act, 1856, for the purpose of being wound up. Upon these facts it was decided that Mr. Addie had no remedy against the new corporation which had been formed. Lord Cranworth observes: “He was a party to a proceeding whereby the company from which the purchase was made was put an end to—it ceased to be an unincorporated, and became an incorporated company, with many statutable incidents connected with it, which did not exist before the incorporation. The new company is now in the course of being wound up. . . . He comes too late; the appellants are not the persons who were guilty of the fraud, and although the incorporated company is by the express provisions under which it was incorporated made liable for the debts and liabilities incurred before the incorporation, I cannot read the statute as transferring to the incorporated company a liability to be sued for frauds or other wrongful acts committed by the directors before incorporation.”

The case was therefore decided upon a point which did not arise in the case of *Barwick v. English Joint Stock Bank*.

But some expressions used by Lord Chelmsford and Lord Cranworth to the effect that an action of deceit is not main-

⁽¹⁾ Law Rep., 2 Ex., 259.

⁽²⁾ Law Rep., 1 H. L., Sc. 145.

tainable against a corporation in respect of frauds of its agents, have been strongly relied upon on behalf of the respondents. With all respect for everything falling from authority so high, their lordships cannot regard these *dicta*, 414] relating as they do to English *forms of action, as necessary to the decision of *Addie v. Western Bank of Scotland*. Lord Cranworth, indeed, admits that, "if by the fraud of its (i. e., an incorporated company's) agents third persons have been defrauded, the corporation may be made responsible to the extent to which its funds have profited by these frauds."

Upon this it may be observed that, if the fraud by which the corporation benefited consisted of a misrepresentation not forming part of or leading to a contract with it, it is difficult to see how, in many cases, they could be made responsible, except in an action for deceit. If it be suggested that an action for money had and received might lie, it may be answered that even if that were so, the question to be tried would be in substance the same, and the evidence the same, and that the time has passed when much importance was attached to mere forms of action. If the benefit received by the corporation happened to be in the shape of a specific chattel instead of money, it is difficult to see what better title they would have to retain it, but in that case the action for money had and received would not lie, and some form of action of tort would have to be resorted to. Lord Cranworth further observes, in explanation of some observations which fell from him in *Ranger v. Great Western Railway Company* (¹), "the allegation of Ranger was that by the fraud of Mr. Brunel, the company's engineer, he had been induced to contract to do and had done works for them at a price grossly below their real cost, say for £20,000 instead of £40,000. The company got the full benefit of what he had so done, and in what I said I merely wished to guard against its being supposed that I assented to the argument that there would be no means of reaching the company, if the fact of the fraud had been established. By what particular proceedings relief could have been obtained is a matter on which I did not intend to express, and indeed had not formed, any opinion." Unless the remedy against a company in respect of the fraud of its agent is to be confined to cases where the fraud is part of a contract, and the contract can be rescinded so as to place the parties in *statu quo*—a doctrine much narrower than that laid down by Lord Cranworth—it appears to their lordships to follow that an

(¹) 5 H. L. C., 88.

action of deceit is maintainable, wherein, as laid down by the *Exchequer Chamber, the fraud of the agent may [415 be treated for purposes of pleading as the fraud of the principal. Nor do they see any valid reason for exempting incorporated more than unincorporated companies from this action. In their opinion, Lord Cranworth stated the law on this subject correctly in *Ranger v. Great Western Railway* (1), when he observed, "strictly speaking, a corporation cannot of itself be guilty of a fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished by the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principle must prevail where the principal under whom the agent acts is a corporation."

It remains to apply the principles of law which have been stated to the facts of this case.

If there had been any serious conflict of evidence as to the duties and authority of Sancton, it would have been proper to direct this question to be re-tried. But their lordships are satisfied to take, as Mr. Justice Weldon did, the statement of the defendant's witness, the president of the bank, on this subject. Had the message been sent to the bank it can scarcely be questioned that it would have been the duty of Sancton to answer it with a view to obtaining the acceptance of the plaintiffs to the effect that funds had been provided for the previous bills, and if, with the same object, he had added to this a statement that Lingley was carrying on his business at St. John, although, of course, it would not have been his duty to state a falsehood, still the sending of the telegram with the false statement would have been "within the scope of his authority," as that expression has been explained. But, it has been urged, the telegram was sent, not to the bank, but to Lingley, and was answered on behalf of Lingley, not of the bank. The position, however, of Lingley and of the bank must be borne in mind. Lingley had been released from all his obligations, and was no longer interested in the acceptance of the bills: the bank was deeply and solely interested in their acceptance. Under these *circumstances, on the telegram being brought [416 to the bank, their lordships think that it was still in the usual course of the business entrusted to Sancton to answer it, and

(1) 5 H. L. C., 86.

that when he did answer it in the bank's interest in such a manner as to convey what was false together with what was true, he was still acting "within the scope of his authority."

For these reasons their lordships are of opinion that Mr. Justice Weldon was right in directing the jury that the sending of the telegram was within the scope of Sancton's authority. This being so, the question whether or not Sancton was authorized to send it by the directors becomes immaterial.

It is not necessary to determine whether or not the plaintiffs could have maintained their verdict if they had proved only they had sustained damage from the fraudulent representation of an agent of the defendants made within the scope of his authority, without proof of the defendants having profited thereby: nor whether they could have maintained it, if they had not proved the representation of Sancton to be within the scope of his authority, but had proved that the defendants accepted the benefit of it, with notice of the fraud,—propositions which have been contended for at their lordships' bar. It is enough in this case to decide that the plaintiffs, having established that they have suffered damage and that the defendants commensurately profited by the fraudulent representation of Sancton made within the scope of his authority, are entitled to maintain their verdict.

For these reasons their lordships will humbly recommend Her Majesty that the judgment of the Supreme Court be reversed, and the order directing a new trial be discharged.

The appellants will have their costs in the courts below and of this appeal.

Solicitors for the appellant: Messrs. *Vizard, Crowder & Co.*

Solicitors for the respondents: Messrs. *Field, Roscoe, Field, Francis & Osbaldeston.*

The principal is liable for the fraudulent acts or the representations of his agent in the transaction of business entrusted to the latter by the former: *Elwell v. Chamberlain*, 2 Bosw., 230, S. C. again 4 Bosw., 320, affirmed on appeal 31 N. Y., 611; *Sharp v. Mayor*, 25 How. Prac., 390; *Bennett v. Judson*, 21 N. Y., 238; *Ferguson v. Hamilton*, 35 Barb., 427; *Brookman v. Metcalf*, 4 Rob., 568, 34 How. Prac., 429; *Crane v. Hunter*, 28 N. Y., 389; *Graves v. Spier*, 58 Barb., 349; *Davis v. Bemis*, 3 Am. Law Times, State Courts R., 50, an excellent case in the N. Y. Court of Appeals not elsewhere reported though referred to in a note to *Lee v. Village of Sandy Hill*, 40 N. Y., 453; *Meehan v. Forrester*, 52 N. Y., 277.

The principal may be held liable either in an action of fraud or by way of estoppel: *Grinbold v. Haven*, 25 N. Y., 595.

It will be presumed, after the lapse of a reasonable time, that the agent advises his principal of the terms on which he accepted a security, and the principal will be bound thereby. *Meehan v. Forrester*, 52 N. Y., 277.

The principal cannot enjoy the profits of a bargain made by his agent, without adopting the instrumentalities by which he consummated it: *Elwell v. Chamberlain*, 31 N. Y., 611; *Cobb v. Doves*, 10 N. Y., 335, 345.

But this doctrine must be confined to cases of voluntary ratification of the acts of an agent. It does not apply to

cases where the principal involuntarily receives the proceeds of the transaction, without knowledge of the agent's wrong for his own benefit, and not for the benefit of his principal: *Condit v. Baldwin*, 21 N. Y., 223; *Lee v. Chadsey*, 3 Abb. Ct. App. Dec., 43; *Elmer v. Oakley*, 3 Lansing, 34; *Bell v. Day*, 32 N. Y., 165; *Fellows v. Commissioners*, 36 Barb., 655; *Chatham Bank v. Betts*, 9 Bosw., 552, affirmed in Ct. Appeals, June, 1868.

See *Porter v. Mount*, 5 Am. Law Reg., N. S., 292; *Alger v. Gardner*, 54 N. Y., 360, Commission of Appeals. It is doubtful whether either of these cases is sound law. Nor does the rule apply where the agent without the principal's knowledge, does an unauthorized act without fraud; the principal is responsible for his agent's honesty, but does not guaranty he shall not exceed his authority: *Smith v. Tracy*, 36 N. Y., 83-86; *Strode v. Dyson*, 3 Smith (Eng.) Rep., 400.

Nor to cases where one not in fact an agent to act for a principal, commits a wrong in obtaining property subsequently delivered to, or even obtained for, another: *Booth v. Bierce*, 38 N. Y., 463, reversing 40 Barb., 114.

A master or principal is liable for the acts or the negligence of his servant or agent, while legitimately engaged about his master's business: *Thomas v. Winchester*, 6 N. Y., 397; *Bruff v. Mali*, 36 N. Y., 205-6; *Indianapolis, etc., v. Anthony*, 43 Ind., 183.

So in cases where the agent or servant acts without special orders of the principal or master, if he is justified in doing it as between him and his principal or master without an express order: *Gilmartin v. Mayor*, 55 Barb. 239; *Purvis v. Coleman*, 1 Bosw., 321, 21 N. Y., 111.

See note 3 Eng. Rep., 313; 4 Eng. Rep., 393.

Even though contrary to the master's orders: *Southwick v. Estes*, 7 Cush., 385.

As in erroneously labelling drugs: *Thomas v. Winchester*, 6 N. Y., 397; so for a conductor illegally exacting extra fare: *Chase v. N. Y. Cent. R. R.*, 26 N. Y., 523. In illegally putting a passenger off a car: *Indianapolis, etc., v. Anthony*, 43 Ind., 186. Or for the negligence of a conductor in helping a passenger upon or off a car: *Drew v.*

Sixth Ave. R. R., 26 N. Y., 49; *Dow v. Sixth Ave. R. R.*, 2 Transcript Appeals, 246. In taking down a liberty pole in a public park: *Gilmartin v. Mayor*, 55 Barb., 239. A travelling agent in not properly taking care of a team hired by him: *Pickens v. Diecker*, 21 Ohio St. R., 212. An agent to ship goods accepting a qualified bill of lading at the time of shipping the goods; otherwise if subsequently accepted: *Shelton v. Merchants' Despatch*, 36 N. Y. Superior Court Rep., 527. So in improperly leaving a truck in the street by which a passer by is injured from another truck being run against it: *Powell v. Deveney*, 3 Cush., 300. So for an injury from snow being thrown from the roof of a house, by one who volunteered to assist a servant: *Althorpe v. Wolfe*, 22 N. Y., 355. It has been held otherwise where a servant employed another to do his work and such other, of his own volition and without the knowledge or direction of the servant employing him, did an act which occasioned an injury to another: *Simons v. Monier*, 29 Barb., 419, but we doubt the soundness of the distinction; so the master is liable if a servant carelessly throw a keg out of a window, injuring one in a passage way below, even though the injured person had no title in the passage way and the master could at any time have revoked his license to pass therein: *Corrigan v. Union, etc.*, 98 Mass., 577; so if one be injured by a blast in consequence of a want of notice thereof, while passing over land of the master by license: *Driscoll v. Newark, etc.*, 37 N. Y., 637; so to one injured by the negligence of those employed by a municipal corporation in the repair of its public sewers: *Lloyd v. Mayor, etc.*, 5 N. Y., 369.

A person or corporation is not liable for the negligence of the servants of a contractor: *Gent v. Mayor, etc.*, 6 Seld. notes, 68; *Pack v. Mayor*, 8 N. Y., 222; *Kelly v. Mayor*, 11 N. Y., 432; *Gilbert v. Beach*, 5 Bosw., 445; *Potter v. Seymour*, 4 Bosw., 140; *Benedict v. Martin*, 36 Barb., 288.

Nor is a contractor liable for the negligence of the servants of a sub-contractor: *Blake v. Ferris*, 5 N. Y., 48.

The contractor or person doing the work is liable: *Bliss v. Schaub*, 48 Barb., 339.

And the owner would if he assumed

to control the contractor and directed the work: *Heffernan v. Benkard*, 1 Rob., 432.

Or if the injury is occasioned, not by any fault of the contractor or his servants, but is the result of an act which the person or corporation, by their contract, direct to be done, as in excavating a street which the corporation is bound to keep in proper condition: *Lockwood v. Mayor*, 2 Hilt., 66; *Creed v. Hartman*, 29 N. Y., 591, 595; *Congreor v. Smith*, 18 N. Y., 79; *Irvin v. Wood*, 4 Rob., 138, 51 N. Y., 224; *Storrs v. City of Utica*, 17 N. Y., 104; *Clark v. City of Lockport*, 49 Barb., 580.

A master though standing by is not liable for the wrongful act of his servant, in wilfully setting a dog upon cattle trespassing upon the master's lands, if the master immediately call the dog off: *Steele v. Smith*, 3 E. D. Smith, 321; *Tift v. Tift*, 4 Den., 175; nor is the owner of a steamboat for the wilful misconduct of the master, in running his boat against another: *Richmond, etc., v. Vanderbilt*, 1 Hill, 480; a master is not liable in trespass for the acts of his servant, unless the particular wrongful act was done by his order: *Yerger v. Warren*, 81 Penn. St. R., 319.

If the act of the servant be wilful or malicious and not within the scope of the servant's duty, the master is not liable: *Garvey v. Dang*, 80 How., 315.

See Moak's note, 3 Eng. Rep., 313; Id. 4 Eng. Rep., 392.

But the master is liable if the act is within the scope and duty of the servant, it being in many cases a question of fact whether such is the case: *Whatman v. Pearson*, L. R. 3 C. P., 422; *Indianapolis, etc., v. Anthony*, 43 Ind., 183; *Redding v. South, etc.*, 3 South Carolina Rep., N. S., 1; see Moak's note 3 Eng. Rep., 313; Id. 4 Eng. Rep., 392. If a boy sixteen years of age only, leaps from a railroad car while in motion, in obedience to the command of the conductor, accompanied by a show of force the court cannot say judicially that the act of the boy was voluntary, but should leave it to the jury to say, whether under all the circumstances, the conduct of the conductor did not amount to compulsion: *Klien v. C. P. R. Co.*, 37 Cal., 400, but see *Pittsburgh v. Donahue*, 70 Penn. St.

Reports, 119. A boy climbed upon the rear end of a train of cars which was slowly backing round a curve. The engineman, by reason of houses, could not see the rear end of the cars. The boy was holding by the bumper with his feet upon the brake bar. A sudden jolt threw the boy upon the track where he was run over and killed. The mother of the boy brought an action for his death. It was proven that the boy had been driven from similar trains on former occasions. There was no employé on the rear of the train, or walking in advance of it on the track while backing. Held, 1. The liability of the company, if any, arose upon the statute which limited the same to a "wrongful act, neglect or default," and they were not liable for a neglect to use that degree of vigilance which the law requires toward those with whom there is a relation of trust and confidence or bailment between the parties. 2. If there was neglect or default on the part of the boy, or the absence of that prudence which boys of like age and capacity usually exhibit, the defendants were not liable, although by the exercise of extraordinary care on their part the accident might have been prevented. 3. That in actions for injuries resulting in death, the plaintiff must show that neither the party injured, nor the parties for whose use the action was brought, had contributed by neglect or want of care to the calamity complained of: *State v. Baltimore, etc.*, 24 Maryland, 84.

Although a person gets upon a railroad car wrongfully and as a trespasser, for the purpose of riding without paying his fare, yet the conductor, if he resolves to exercise his right to remove him, must do so prudently, and in such a manner as not to endanger his personal safety. If he do not exercise this prudence and an injury result, the company cannot absolve itself from liability on the ground that the wrong was mutual: *Klien v. C. P. R. Co.*, 37 Cal., 400.

A corporation is liable for the wilful acts and torts of its agents committed within the general scope of their employment, as well as acts of negligence; and the corporation is thus bound, although the particular acts have not been previously authorized, or subse-

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quently ratified by the corporation. The act of the agent within the general scope of his employment is the act of the master, and if wrongful the master is liable although the act be unnecessary to the performance of the master's service, and was not intended for that purpose. The liability of the master does not depend upon the necessity of the act, or the *intent with which it was done*, but whether the act was wrongful and within the general scope of the employment of the agent: *Indianapolis, etc., v. Anthony*, 43 Ind., 183; *Jeffersonville, etc., v. Rogers*, 88 Ind., 126; *Ramsden v. Boston & Albany R. R. Co.*, 104 Mass., 117; *Pittsburgh, etc., v. Donahue*, 70 Penn. St. R., 119.

See *Whittaker v. Eighth Ave. R. R.*, 51 N. Y., 295.

A master is responsible in a civil action for the tortious act of his servant committed in the course of the latter's employment, and it makes no difference that the act was done wilfully, and without the knowledge of the master, or even in disobedience of his orders: *Redding v. South Carolina R. R. Co.*, 8 South Carolina Rep., N. S., 1, 6-9; *Philadelphia, etc., v. Derby*, 14 How., U. S., 486-8; see also 24 Maryland, 84.

A master may be liable for the trespasses of his servant done honestly in the course of his employment. It is his duty when he sets his servant at

work cutting timber, to take reasonable precautions to prevent him from ignorantly trespassing on neighboring proprietors; and he is responsible for his trespasses committed under the direction of his own overseer as if he had given them himself. But if the servant act wilfully and without authority, other considerations will *sometimes* need to be regarded: *Smith v. Webster*, 23 Mich., 298.

And the master if he has contracted to do a particular act, is liable for the wilful refusal of his servant to perform it if within the scope of his authority: *Weed v. Panama, etc.*, 17 N. Y., 362; *Robbins v. Mount*, 81 How., 81, 87, 4 Robertson, 558.

In the absence of statutory provisions, a city is not liable for the negligence of firemen, when going to a fire, in running over one passing on a public street. The firemen are an independent organization and not the *servants* of the city: *O'Meara v. Mayor, etc.*, 1 Daly, 425; *Hafford v. City of New Bedford*, 16 Gray, 297; *Wheeler v. Cincinnati*, 19 Ohio St. R., 19; *Terbush v. Norwich*, 88 Conn., 225; see 75 Pa. St. 347.

But in such cases the fire department is liable, and in some cases, by statute, the city: *Clarissy v. Metropolitan, etc.*, 7 Abb. Prac. Rep., N. S., 853; see also *Deyo v. Saratoga Springs*, 3 N. Y. Sup. Court Rep., 504, 1 Hun, 341.

[Law Reports, 5 Privy Council Cases, 417.]

J.C.(¹), Feb. 28; Mar. 3, 4, 23, 1874.

*THE COLONIAL BANK OF AUSTRALASIA and JOHN [417] TURNER, the Official Agent of the Golden Gate Gold Mining Company, Registered, Appellants; and ROBERT WILLAN, a Shareholder in the said Mining Company, Respondent.

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA.

Mining Courts of the Colony of Victoria—Appeal—Inferior Court—Certiorari.

Where a public company has been incorporated by virtue of a statute which prescribed certain rules for the constitution of such companies, and for regulating their proceedings, it will be assumed, in judging of the transactions between the company and other parties, that the requirements of the statute have been complied with. (See note at end of case.)

(¹)Present:—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, SIR ROBERT P. COLLIER, and SIR LAWRENCE PEEL.

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The Supreme Court of the colony of Victoria has a general power to issue a writ of *certiorari* to any inferior court in the colony to bring up the proceedings of such court, coextensive with the like power of the Court of Queen's Bench in England.

The Courts of Mines, which have been created by acts of the local legislature of the colony of Victoria, and with a jurisdiction limited both as to the persons and the matters within the colony over which it is to be exercised, stand, in relation to the Supreme Court, on the footing of inferior courts.

The power of the Supreme Court to issue a *certiorari* to the Courts of Mines in respect of any proceedings under the Mining Statute, 1865, has been taken away by statute.

An appeal may be brought by the shareholders of a mining company to the Chief Judge of the Court of Mines against an order made by a Judge of a Court of Mines for winding up a company upon such a proceeding as that prescribed by the 28th and following sections of the Mining Companies Limited Liability Act, 1864.

Where *certiorari* is said to be taken away by statute, the Superior Court is not absolutely deprived of the power to issue the writ; but its action as to the writ is controlled and limited, and it cannot quash the order removed by *certiorari* except upon the ground either of a manifest defect of jurisdiction in the tribunal that made the order, or of manifest fraud in the party procuring it.

¶ Matters on which the defect of jurisdiction depends may be apparent on the face of the proceedings, or may be brought before the Superior Court by affidavit, but they must be extrinsic to the adjudication impeached.

Objections on the ground of defect of jurisdiction may be founded on the character and constitution of the inferior court, the nature of the subject matter of the inquiry, or the absence of some preliminary proceeding which was necessary to give jurisdiction to the inferior court.

The objection of defect of jurisdiction cannot be entertained if it rests solely on the ground that the judge has erroneously found a fact which was essential to the validity of his order, but which he was competent to try. (See *Revill v. Blake*, 6 Eng. Rep., 226, 248, note.)

The principle acted on in *Rez v. Bolton* ⁽¹⁾, that an adjudication by a judge having jurisdiction over the subject matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein, recognized and followed.

The rule in *Bunbury v. Fuller* ⁽²⁾ approved.

It is not incumbent on a person lending money to a joint stock company to ascertain that all the proceedings of the company and its shareholders, *inter se*, have been strictly regular. (See note at end of case.)

Where a question was raised whether a fraudulent use had been made of the machinery for winding up registered companies, such question being a complicated one, dependent on a variety of circumstances capable of explanation, and requiring nice consideration:

Held (reversing the decision of the Supreme Court of the colony of Victoria), that the order complained of ought not to have been quashed on *certiorari*.

Semble, the Court of Mines of the colony of Victoria has power to review an order of its own for winding up a registered company whether made *ex parte* or not, on the suggestion that the order was fraudulently obtained.

If a party makes a fraudulent use of the process of a Mining Court, and no remedy is to be had in that court, the parties aggrieved may obtain relief by regular suit in the supreme or other competent court.

THIS appeal was brought from a judgment of the Supreme Court of Victoria, making absolute a rule *nisi* to quash an order made by the Court of Mines of the district of Beechworth, for winding up the Golden Gate Gold Mining Company, Registered.

The company had been registered at Wood's Point, in the

⁽¹⁾ 1 Q. B., 66.

⁽²⁾ 8 Eng. Rep., 9 Exch., 111.

said district, under the 9th section of the Colonial Act, 27 Vict. No. 228, the Mining Companies Limited Liability Act, 1864, and had thereby become incorporated by virtue of the 12th section of that act.

The company originally kept its banking account with the Union Bank, and the account was overdrawn. On the 7th of March, 1866, one Philip Weis was requested by certain persons, who acted as directors of the company, to act as temporary *manager. He, as such temporary man- [419] ager, caused an advertisement to be inserted in the Argus newspaper, published at Melbourne, calling an extraordinary meeting of the shareholders. The terms of the advertisement were as follows:

"Golden Gate Gold Mining Company, Registered.

"An extraordinary meeting of the shareholders of the above company will be held at the office of the company, Raspberry Creek, on Monday, the 7th of May, 1866, at 3 o'clock, p.m.

"Business—

"1. To appoint a manager.

"2. To audit accounts and transact such general business as may be brought forward.

"3. To cancel existing scrip and issue new scrip.

"March 12th, 1866. "Philip Weis, Manager, *pro tem.*"

A meeting was held accordingly on the 7th of May, 1866. At this meeting the following resolutions were carried, namely: "That Mr. P. Weis be appointed manager of the company." "That the banking account be moved from the Union Bank to the Colonial Bank of Australasia, and request Mr. Hogarth to wait on the manager of the Colonial Bank and make arrangements with him regarding the overdraft to the Union Bank." Shortly after the date of this meeting the company's banking account was transferred from the Union Bank to the Colonial Bank of Australasia, and the latter bank satisfied the overdraft.

It may be convenient to indicate here the provisions of local legislation which bear most closely upon the proceedings out of which the appeal arose.

By the Gold Fields Act of the colony of Victoria, 1857, 21 Vict. No. 32,

The Governor in council is empowered (sect. 13) to erect any portion of the colony into a mining district; and it is provided (sect. 14) that in every such district there shall be a court to be called the Court of Mines. The Judge of the Court of Mines may (sect. 70) grant a rehearing, and may state a case for the opinion of the Supreme Court. (Sect. 71.) An appeal lies from the Court of Mines to the Supreme Court; and it is provided (sect. 127) that no proceedings under the act shall be removed or removable into the Supreme Court save as

thereinbefore provided; and by sect. 71, "If any party to any suit in any court holden under this act, or to any proceeding before the judge of any such court, [420] shall be dissatisfied with the *determination or decision of the said court, or with any order of a judge thereof, not being an order of commitment, such party may appeal from the same to the Supreme Court.

The 27 Vict. No. 228, the Mining Companies Limited Liabilities Act, 1864, provides,

Sect. 6. "That every such company shall appoint a manager, and no action or suit at law or in equity shall be brought against any member of such company for the recovery of any debts contracted for or by the company."

By sect. 7, "Every contract made by the manager for the time being for the purchase of goods or the performance of work, and the supply of the materials for the same, to an amount respectively not exceeding £50, for the purposes of the said company, shall be binding upon the company and upon the assets thereof, as herein provided; and such assets may be seized and sold in execution in any action against such company upon any such contract."

Sect. 9 provides for the registration of the company in the Court of Mines nearest to the place of operations.

Sect. 12 enacts that on the registration of a company under the act it shall become a corporation.

Sect. 15 prescribes, under a penalty, that every such company shall have a registered office, to which all communications and notices may be addressed; and service of any notice or legal process at such office shall be deemed to be service upon the company.

By sect. 21, "Any company registered under this act, with the sanction of a majority in number and value of the shareholders in such company given at an extraordinary meeting, may from time to time increase its capital by the issue of new shares, such aggregate increase to be of such amount, and to be divided into shares of such respective amounts, as such majority directs, and also from time to time may borrow money not exceeding such sum as such majority directs."

Sect. 23. "Fourteen days' notice of any extraordinary meeting to be called under this act shall be given to each shareholder by inserting the same in six consecutive numbers of some newspaper published in Melbourne, and in six consecutive numbers of some newspaper published in the neighborhood of the place of operations of the company; and such notice shall be signed by the manager, and shall specify the place, the day, and the hour of meeting, and the nature of the business, otherwise such meeting shall not have power to transact any business, and every such notice so given shall be sufficient without any other notice whatsoever, any rule of law or of the company to the contrary notwithstanding."

Sect. 26. "After the incorporation of any company, the manager shall (unless it is otherwise provided by any rules of the company) convene an extraordinary meeting of the shareholders, for the purpose of deciding the number of directors, and for electing the same; and the majority in number and value of the shareholders present at such meeting shall decide and elect accordingly; and such directors shall have the custody and use of the common seal, and shall carry on and transact the business and affairs of the company."

Sect. 27 empowers the Governor to appoint an official agent for each mining [421] *district, and provides that when the Court of Mines shall have made any order or decree for winding up a company, the official agent for the district shall have power to collect all debts and to sell or dispose of all the assets of the company, and to enforce payment by the shareholders of the amounts (if any) unpaid upon the shares held by them or any of them.

The 28th section provides as follows: "Whenever any creditor to whom such company" (that is, any company registered under the act) "is indebted in a sum exceeding £50 then due, has served on the company a demand under his hand requiring the company to pay the sum so due, and the company has for

the space of three weeks succeeding the service of such demand neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor, such company shall be deemed to be unable to pay its debts, and any such creditor as aforesaid may make application for winding up the company to the Judge of the Court of Mines of the district wherein such company is registered."

Sect. 29. "Any application for the winding up of a company registered under this act shall be by petition, and there shall be filed or lodged at the time when such petition is presented an affidavit verifying the same."

Sect. 30. "Upon the hearing of any petition as aforesaid the said Judge of the Court of Mines may dismiss such petition with or without costs, to be paid by the petitioner; or he may make an order directing the company, by a day to be named in such order, to pay or secure payment to the petitioning creditor of all moneys that may be proved to be due to him, together with such costs as such judge may direct; or the said judge may (if he so thinks fit) on the hearing of such petition make an order or decree for winding up the company forthwith, or such other order as to such judge shall appear to be just."

Sect. 31. "If at the expiration of the time named in such order as aforesaid such payment is not made or security given, the said Judge of the Court of Mines may thereupon make an order or decree for winding up the company."

Sect. 39. "The majority in number and value of the shareholders in any company may from time to time, both before and after incorporation, make and alter rules for prescribing the number and qualification of directors and fixing a quorum thereof; for holding and convening general and special, but not extraordinary, meetings of the shareholders and directors respectively; for the election, removal, and annual retirement of all or some of the directors; for determining the mode of filling occasional vacancies in that body; for settling the number of votes which shareholders may give in respect of any specified number of shares, and whether such votes may or may not be given by proxy; for the deposit and custody of proxies (if allowed and used); for removing and appointing the manager, bankers, and solicitors of the company; for declaring dividends and making calls; for the transfer and relinquishment of shares, and the conditions on which the same respectively may be effected; for keeping minutes of all general, special, and extraordinary meetings of the directors and shareholders respectively; for preparing half yearly balance sheets of the accounts of the company, and auditing and examining the same; for making and producing the reports of the business and affairs thereof; for the custody and use of the common seal, and for any other objects not inconsistent with this act. But if any such rule shall be made or altered after incorporation, it shall be made or altered only at an extraordinary meeting of the shareholders."

*The 3d section of the act 31 Vict. No. 324 (A.D. 1867), [422
"An Act to Amend the Mining Companies Limited Liability Act, 1864." is as follows:

"It is declared and enacted that the words, 'upon the hearing of any petition,' wherever the same are used in the said act, shall be construed, deemed, and taken to mean and include an application to a Judge of the Court of Mines, whether sitting in court or not, or to the Court of Mines, and whether made to the said court or to the said judge upon an *ex parte* application, or after service of notice of such application at the office of the company, or upon summons so served returnable before the judge or before the court; and no order heretofore or hereafter to be made shall be deemed to be invalid or impeachable upon the ground that the same was made by the judge or by the court upon an *ex parte* application: Provided that the said Judge or Court of Mines shall have power from time to time, if it should be deemed advisable, upon the application of any party claiming to be interested in or affected by such order, to set aside or vary any such order."

The Courts of Mines were first created in 1857 by the local

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statute above cited, No 32 of the 21 Vict., since repealed by the Mining Statute, 1865. At the time of the proceedings out of which the appeal arose the latter act defined the powers and functions of the Courts of Mines, and regulated their procedure.

The jurisdiction given to these courts to wind up registered companies was conferred upon them by the Mining Companies Limited Liability Act, 1864⁽¹⁾, which was passed after the former, but before the latter, of the two last-mentioned statutes.

By the Mining Statute, 1865, it was enacted that within and for every mining district there should be a court to be called the Court of Mines; that such court should be a court of record; that the Court of Mines which at the time of the commencement of the act should be in existence in any mining district existing at that time should be and be deemed a Court of Mines constituted under that act.

To these courts this statute gave, in very general terms, jurisdiction to hear and determine all suits which might arise concerning miners' rights in Crown lands, or concerning or out of any partnership for or in relation to mining in any Crown land, or for or in relation to the searching for the metals and minerals mentioned in the act, or generally concerning all questions and disputes cognizable by a court 423] of law or by a court of equity which *might arise between miners in relation to mining on Crown lands. But it did not expressly refer to the peculiar jurisdiction to wind up registered companies which had been given to the Judges of Courts of Mines by the act of 1864.

Again, a material difference between the Mining Statute, 1865, and the repealed act of 1857 consisted in this. The latter had, by its 71st section⁽²⁾, given an appeal from the Courts of Mines to the Supreme Court, and by its 127th section had provided that no proceedings under that act should be removable to the Supreme Court except as therein provided. The Mining Statute, 1865, created a Chief Judge of the Court of Mines, who was to be one of the Judges of the Supreme Court; and, by its 172d section⁽³⁾, gave an appeal to him in lieu of the appeal given by the repealed statute to the Supreme Court; providing, by its 244th section, that "no proceedings under that act should be removed or re-

(1) Sect. 28, *supra*, p. 421.

(2) *Supra*, p. 419.

(3) "Any party to any suit in any Court of Mines, or to any proceedings before the judge of any such court (except where the contrary is herein provided), who

shall be dissatisfied with any decree or order of the said court, or with the order of a judge thereof, not being an order of commitment made by such judge, may appeal from the same to the Chief Judge."

movable into the Supreme Court, save and except as thereinafter provided (')."

In the month of September 1866, the Colonial Bank of Australasia commenced an action against the company to recover the sum of £2,163 3s. 4d., as due to the bank by the company on the overdrawn account. A defence was entered on behalf of the company to the action, and issue was joined therein and notice of trial given, but the bank obtained orders to postpone the trial for three successive sittings, and it did not proceed further in the action, but abandoned it; nor did it take any further or other proceedings in respect of the claim against the company until the year 1871.

On the 11th of August, 1871, the appellants served on the company a demand in writing requiring the company to pay the sum of £3,223 11s. 8d. (being the amount advanced by the bank to satisfy the overdraft above referred to, with interest); and on the 16th of November, 1871, the [424] bank served on the company, at its registered office in Melbourne, a notice requiring the company to appear at the court house at Wood's Point on the 18th of the same month, to answer a petition therein stated to have been already presented (but which in fact had not been presented), and to show cause why a winding-up order should not be made by the Judge of the Court of Mines of the district.

On the 18th of November the bank presented a petition (verified by affidavit) to the Judge of the Court of Mines, setting forth that the mining company was indebted to the bank in the sum of £2,223 11s. 8d. for moneys lent by the bank to the company; that the bank had served on the company a written demand requiring the company immediately to pay the said sum; that the company had, for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same; and that the whole of such sum was still due and owing by the company to the bank; and praying that the company might be wound up under the provisions of the Mining Companies Limited Liability Act, 1864.

On the same day the Judge of the Court of Mines made an order that the company should be wound up forthwith. The order was in the following terms: "Whereas on the 11th of August, 1871, the Colonial Bank of Australasia, a creditor of the said company, served on the said company a demand, under their seal, requiring the said company to pay the sum of £3,223 11s. 8d., then due to the said bank, and the said company has, for the space of three weeks succeed-

(1) This was a mistake, as the act contains no provision on the subject.

ing the service of such demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the said bank: And whereas, on the 18th day of November instant, the said Colonial Bank of Australasia did present to me, the undersigned Judge of the Court of Mines of the district in which the said company was registered, to wit, in the district of Beechworth aforesaid, their petition setting forth the facts hereinbefore recited, and praying that the said company might be wound up; and at the time of presenting the said petition, an affidavit of William Greenlaw, the acting general manager of the said bank, verifying the same, was filed in the last-mentioned court: And whereas 425] the said company has been *duly served with a notice in this behalf, which required them to appear here before me this day to answer the said petition, and to show cause why I should not make an order directing the said company, by a day to be named in such order, to pay or secure payment to the said Colonial Bank of Australasia of the said sum, together with such costs as I might direct, or why I should not make an order for winding up the said company forthwith, or such other order as to me should appear to be just: And whereas the said company has not appeared before me this day, or shown any sufficient cause as required by the said notice: Now, therefore, upon the hearing of the said petition, and upon reading the said affidavit, and upon proof as well as of the facts and matters aforesaid, as that the said sum is now due from the said company to the said Colonial Bank of Australasia, and upon hearing Mr. Finlayson, of counsel for the said Colonial Bank of Australasia, I do order that the said company shall be wound up forthwith."

On the 16th of February, 1872, the agent in Melbourne for the appellant, John Turner (who was the official agent for the district, under the 27th section of the Mining Companies Limited Liabilities Act, 1864⁽¹⁾), and as such was charged with the conduct of the winding-up) showed to William Scott, the manager of the mining company, at the company's office, the original winding-up order. Subsequently the appellant, John Turner, as such official agent, called, by advertisement, a meeting in the estate of the company for the proof of debts, to be held at the Court of Mines, Beechworth, on the 6th of May, 1872. At this meeting the bank proved a debt against the company to the amount of £3,223 11s. 8d., to the satisfaction of Mr. Hackett, the Judge of the said Court of Mines, in pursuance of the provisions of the 33d section of

(1) *Supra*, p. 420.

the Mining Companies Limited Liability Act. This proof was not opposed.

On the 26th of August, 1872, the respondent made an application to the same court to set aside the order obtained on the 18th of November, 1871.

Mr. Bowman, the Deputy Judge of the Court of Mines, who heard the application, stated in his judgment that it had been admitted by counsel on both sides that the main point left for him to decide was whether the winding-up order of the 18th of *November, 1871, was or was not [426 made upon an *ex parte* application; that presuming, as he thought fair, that the notice was given early in the morning of the 16th of November, the company had two days during which they might have acted; that there was telegraphic communication between Melbourne and Wood's Point, and that, so far from the affidavit of the manager of the company setting out that he used due diligence and made reasonable efforts to comply with the notice served, it distinctly set forth that he did nothing. The Deputy Judge therefore, held that he was bound to assume that the judge who made the winding-up order exercised a wise discretion and due caution in satisfying his mind that notice of the application had been duly served, and he decided that the order was not made upon an *ex parte* application, and that it ought not to be set aside.

On the 10th of September, 1872, the Supreme Court, upon the application of the respondent, ordered that a writ of *certiorari* should issue directed to the said Deputy Judge, commanding him to send under his seal the record of the order of the 18th day of November, 1871, which was done accordingly.

On the 22d day of November, 1872, a rule *nisi* was obtained by the respondent, calling upon the Deputy Judge and the appellants to show cause why the order of the 18th of November, 1871, should not be quashed, on the grounds, first, that there was no jurisdiction to make the said order, as at the time it was made the company was not indebted to the bank in any sum; and, secondly, that it was obtained by a fraud on the judge.

The affidavits on which the writ was issued were made by the respondent, by Philip Weis, and by certain shareholders in the company.

The case made by the respondents was to the following effect:

No rules of the company were made before the incorporation thereof, or until April, 1867, and no directors were

elected or appointed at any meeting of shareholders duly convened until the 26th of April, 1867, when, at an extraordinary meeting of the shareholders duly convened, directors were for the first time duly elected and appointed, and at the same meeting rules were for the first time made.

427] *That Frederick B. Ludlow was the first manager of the said company, that Philip Weis was the second manager : that on or about the 7th of March, 1866, Weis, before he claimed to have been appointed manager, and before Ludlow had formally resigned or been removed, was requested by one William Hogarth, a shareholder in the company, and the alleged chairman of a meeting of persons (who called themselves directors, but had never been in fact elected or appointed) to act as temporary manager ; and Weis at the request of the said William Hogarth, and another, caused to be inserted in the Argus newspaper, published in Melbourne, the above advertisement, dated the 12th of March, 1866, but it did not appear that it had been published as required by the act, and, in fact, the notice was not duly or regularly given in accordance with the provisions of the act.

That a search had been made in the minute book of the company, from the date of its incorporation up to the month of September, 1866, and the minute book during the said period did not contain any resolution of any extraordinary or other meeting of the shareholders of the company authorizing any borrowing of money, or any resolution referring to the bank, except the second resolution of the 7th of May, 1866 ; that at no meeting called in accordance with the provisions of the act was any authority or sanction given by the shareholders of the company to borrow any money from the bank or at all ; and that it did not appear from the evidence that any advertisement or notice ever appeared in any newspaper whatsoever giving notice of any extraordinary or any other meeting of the shareholders of the company which specified in such advertisement or notice that the nature of the business for which the meeting was called was to authorize or sanction the borrowing of money either from the bank, or elsewhere, or at all, as required by the act (1).

That in June, 1868, the mine and business of the Golden Gate Gold Mining Company were sold to another company, called the A 1 Gold Mining Company, Registered, in consideration of certain shares allotted by the A 1 Mining Company to the shareholders of the Golden Gate Gold Mining Company, and since the latter part of the said year 1868 428] there had been no business for the latter *company to

(1) Mining Companies Limited Liabilities Act, 1864, s. 15.

transact, and it had not, in fact, carried on any business; and, as from the month of October, 1868, the then manager of the latter company ceased to draw any salary from, or to be in any manner employed by, the company, and the company's operations having ceased, no other manager had, since the said date, been employed by the company: and that the name of the company then or soon after was taken down from No. 37 Market Street, which had been the office of the company.

That it was not the fact, as recited or stated in the notice served on the 16th of November, 1871, that at the date of the said notice the petition therein mentioned had been presented by the bank; and that the petition was not presented until the 18th of November, 1871, being the day when the winding-up order was made.

That the court house at Wood's Point, in the mining district of Beechworth, at which, as stated in the said notice, the said company was required to appear on the 18th of November, the notice having been served on the 16th of November, was distant from Melbourne 120 miles or thereabouts, and in the month of November, 1871, the time occupied in travelling from Melbourne to Wood's Point aforesaid by coach, the ordinary and quickest mode of conveyance, was twenty-four hours.

That the shareholders had received no notice of the winding-up order and the proceedings under it until July, 1872; and that if they had received notice earlier, they would have endeavored to cause appearance to be made and a defence to be undertaken on behalf of the company.

The respondent, on the 22d of November, 1872, on behalf of himself and the said majority of the said solvent shareholders, caused a rule *nisi* to quash the said winding-up order to be moved for before the said Supreme Court; and on the said 22d of November, 1872, it was ordered by the said Supreme Court that the Deputy Judge, the bank, and the appellant, John Turner, the official agent, should show cause why the order made by C. P. Hackett, Esq. (then Judge of the said Court of Mines of the mining district of Beechworth), on the 18th of November, 1871, wherein it was ordered that the said company should be wound up, should not be quashed on the following grounds:

*1. That there was no jurisdiction to make the said [429 order of the 18th of November, 1871, as at the time of serving the notice of demand and of making the said order the said Golden Gate Gold Mining Company, Registered, was

not indebted to the said Colonial Bank of Australasia in any sum.

2. That the sum of £3,223 11s. 8d., mentioned in the said order, was not, nor was any part thereof, at the time of the making thereof, due to the Colonial Bank of Australasia by the said Golden Gate Gold Mining Company, Registered, and that the said order was obtained by undue and improper means, calculated to deceive the said Judge of the said Court of Mines who made the same, and to prevent the said company showing reasons to the said judge for refusing to make the said order, and that so the said order was obtained by a fraud on the said judge; and on the further grounds disclosed in the above affidavits.

The affidavits used by the appellants in showing cause against the rule *nisi* stated that many of the shareholders of the company had offered to pay their proportion of the debt if the bank would give them a release; that William Scott, the manager of the company, had often promised to try to get the debt settled. That the respondent signed as chairman a minute of a meeting of the board of management of the company, dated the 21st of June, 1867, at which it was resolved, in answer to a letter from the bank demanding payment of the debt, "that no steps be taken to arrange matters with the Colonial Bank until the amalgamation is finally completed." That on the 1st of August, 1871, the manager was informed that the bank intended to wind up the company unless the debt was paid, and the attorney who acted for the bank in the matter of winding-up used no undue or improper means in obtaining it.

The Supreme Court, on the 10th of December, 1872, gave judgment, making the rule absolute, and ordering the appellants to pay to the respondent the costs of and occasioned by the writ of *certiorari* and of the rule *nisi*. In the statement of the reasons given for the judgment the following passage occurs:

"The real ground on which this application is opposed is that it is not competent for the applicants to go behind the winding-up order. It is said they are bound by the 430] order. In one sense that *is no doubt true: the facts which the judge has found must be taken as true, but to maintain that it is not competent for a person to impugn the order by showing that the judge had no jurisdiction is a proposition that cannot be sustained. This court has held directly the contrary, and its decision has not been questioned. We have held that it is competent to go behind a conviction, or order, or adjudication, or whatever it may be, and to show by affidavit that the proceedings are irregular,

and that the judge has no jurisdiction. Indeed, this objection was not very strongly pressed, although it constitutes the sole objection to the application. One reason given to quash the order is the short notice given. The company was served in Melbourne on Thursday with notice to appear on Saturday at Wood's Point, a place 120 miles distant, and which requires twenty-four hours to reach by coach. According to the affidavits, it was within the bounds of possibility that a person might have reached Wood's Point on the Saturday, and we, therefore, think that we are not at liberty to review the consideration which the judge must be supposed to have bestowed on this part of the case. It certainly is singular, if he considered the case at all, that he should have allowed such extremely short notice to be given in such a matter. However, we cannot discuss here the propriety of his conduct. The shortness of the notice, however, cannot be overlooked when we consider the other ground of the application, namely, that the judge was imposed upon by the petitioning creditors. Those creditors had facts in their possession which they were bound to disclose to the judge, but which they did not; they concealed facts from the judge, which, if he had known, might have induced him not to make the order. These facts are, that there was really no debt due, the directors had no power to incur the overdraft, there were in fact no directors. An extraordinary meeting of shareholders would have had power to incur the debt. But the meeting was not called to sanction the debt, nor is there anything to show it was attended by the majority in number and value of the shareholders. The bank commenced an action against the company for the sum claimed, but that action was postponed from time to time, and no satisfactory explanation has been given of the postponement. One affidavit states that the action was postponed in hopes of having the matter arranged. *That [431] might have been a very good reason for postponement, but it seems a singular reason for stopping the action and taking proceedings to wind up the company at such short notice. We think that there is no petitioning creditor's debt proved, and that there is therefore no foundation for the winding-up order.

"For these reasons we are of opinion that the rule *nisi* to quash the winding-up order should be made absolute."

From this judgment the appeal was brought to Her Majesty in Council.

The appeal now came on to be heard.

Mr. *De Gez*, Q. C., (with him Mr. *J. Dennistoun Wood*), for

the appellants: The Supreme Court had no right to interfere by way of *certiorari*. The colonial statutes give an appeal from the lower Mining Courts to the Chief Judge, and from him to Her Majesty in Council, and the respondents ought to have appealed if they were dissatisfied. The appellate jurisdiction of the Supreme Court in mining cases was transferred to the Chief Judge. The Supreme Court has a general power to issue a writ of *certiorari* to bring up the proceedings of any inferior court in the colony; but not those of the Courts of Mines. The Courts of Mines are not inferior courts, and, independently of this, the power to issue a *certiorari* to them has been taken away by statute⁽¹⁾.

The analogy of the old practice in bankruptcy, by which an adjudication could be set aside, does not apply, because the commission was issued behind the back of the bankrupt, and of course it was necessary that he should have some opportunity of disputing its validity. Successive enactments have provided that he shall have notice, and the adjudication may now be said to be almost conclusive. But the bankruptcy law was never applied to winding-up orders. When under the act of 1856, power was given to various tribunals to make winding-up orders, there was much litigation as to what was the proper court, but no one went to the Court of Queen's Bench to quash a winding-up order.

The Supreme Court has no power to deal with a company 432] not *registered under the General Registration Act of 1864. Mining companies are not so registered. They are registered in a Court of Mining, and the registration itself incorporates them⁽²⁾.

The grounds assigned for quashing the winding-up order are want of jurisdiction; and fraudulent, or, at least, improper concealment of material facts from the court which passed the order. It is said that there was no jurisdiction to make the order, because there was in reality no petitioning creditor's debt, as the meeting at which it was resolved to transfer the bank account was not duly convened for the purpose of borrowing; and it is further said that if there was no jurisdiction in the Court of Mines an appeal would not lie, and the remedy was by way of *certiorari*. But the appellants were not bound to inquire whether the meeting was legally convened or not, and there are cases to show that drawing checks for the current expenses of the bank is not borrowing so as to require the special authority prescribed by the act. The judge had authority to try the fact

⁽¹⁾ The Mining Statute, 1865, *supra*, p. 423.

⁽²⁾ Mining Companies Limited Liabilities Act, 1864, s. 12.

of debt or no debt, and his finding gave jurisdiction to the court, even if it was an erroneous finding.

The question is, whether the lower court had power to enter upon the inquiry, not whether it arrived at a correct conclusion. The Supreme Court was not to judge of the sufficiency of the evidence in favor of the petitioning creditor's debt: *Brittain v. Kinnaird*⁽¹⁾; *Reg. v. Bolton*⁽²⁾ (where the cases are collected); *Ex parte Hopwood*⁽³⁾. Though still requiring full proof at a later stage, the debt is conclusively proved for the purpose of finding the order by the judgment of the court. The statute enables the court to make a winding-up order, and the court has done so, and has, therefore, acted within its jurisdiction.

The sufficiency of notice was declared by the Supreme Court to be a matter within the competency of the Judge of the Mining Court. The facts alleged in the petition for winding-up are perfectly true.

[Mr. *De Gez* was here stopped by their lordships, who called upon the counsel for the respondents to support the order of the Supreme Court.]

*Mr. Benjamin, Q.C., and Mr. *Everitt*, for the re- [433
spondents: Unless there was in point of fact a debt, the winding-up order was made without jurisdiction. The statute lays down distinctly what authority must be given for contracting debt, and its provisions were recently acted on in this court in the case of *Cherry v. Colonial Bank of Australasia*⁽⁴⁾. The Court of Chancery does not allow a winding-up order where there is a disputed debt: *Lindley on Partnership* [3d Ed.], p. 1280. Here the debt had not been duly sanctioned by a meeting of shareholders, so far as we have been able to ascertain, indeed, there is some evidence that no such sanction was given. The Supreme Court finds that there was no debt.

No court of inferior jurisdiction can establish its jurisdiction by proceeding on an assumed fact which is not a fact: *Bunbury v. Fuller*⁽⁵⁾; *Reg. v. Gillyard*⁽⁶⁾. The fullest Chancery jurisdiction is vested in the Supreme Court. *Certiorari* is never taken away except by express words: *Scott v. Bye*⁽⁷⁾. There are many cases of *certiorari* issuing out of Chancery⁽⁸⁾.

A right of appeal can only be given by express words. Taking the different enactments together, there was no appeal

(1) 1 B. & B., 432.

(2) 1 Q. B., 66.

(3) 15 Q. B., 121.

(4) Law Rep., 8 P. C., 24.

(5) 9 Ex., 111.

(6) 12 Q. B., 527; 2 Sm. L. C., 698, 6th ed.

(7) 2 Bing., 344, referring to judgment of Holt, C.J.; 1 Salk., 263.

(8) *Edwards v. Bowen*, 2 S. & S., 514.

open to the respondents, and therefore, it was a case to be set right by the Supreme Court on *certiorari*, for when the legislature creates a court without appeal, it is presumed that *certiorari* lies to restrain excess of jurisdiction.

The Supreme Court is a court having, both at law and in equity, full inherent jurisdiction (unless taken away by the legislature) to grant a *certiorari* to review the proceedings of the inferior courts, whether of law or equity, to prevent the assumption of jurisdiction which they are not entitled to exercise, and to control them in its exercise in certain cases. The notice to appear called on the respondents to answer a petition therein stated to have been filed on the 16th of August, but the petition on which the order was made was not filed until the 18th. The proceedings must therefore be taken to have been without notice. The bank contrived that it should be really a proceeding *ex parte*, but should not 434] *appear to be so, and thus the judge be prevented from reviewing it. If the company had appeared before the Court of Mines and disputed the debt—the Court of Mines then, for the purpose of ascertaining its right to wind up, assuming jurisdiction to determine, and actually determining, that there was a debt and then ordering a winding-up—we admit that in that case there would have been jurisdiction to wind up. But where the judge assumes that the debt is due without argument from the other side, whether the proceeding be by default after notice, or *ex parte* without notice, the judge has not decided the preliminary question. He has taken jurisdiction assuming the preliminary question to be conceded in consequence of the absence of controversy; and therefore *certiorari* lies.

This was not like a case in the County Court; there the decision is whether there is a debt. Here the decision was on the question whether there was to be a winding-up order. *Reg. v. Bolton* ⁽¹⁾ was a criminal case, and of course not *ex parte*: and it does not apply to civil cases, which may be *ex parte*. The doctrine there laid down is qualified by that of *Thomson v. Ingham* ⁽²⁾, a civil case: *Reg. v. Paving Commissioners of Cheltenham* ⁽³⁾; *Reg. v. St. Olave* ⁽⁴⁾; *Reg. v. Arkwright* ⁽⁵⁾. There was no jurisdiction to wind up unless a creditor was before the court, and the question whether there was a creditor there was never argued. The court above could say, not that the court below had no jurisdiction to enter into the inquiry, but that no inquiry having been entered into, and it being now ascertained that there was no creditor,

⁽¹⁾ 1 Q. B., 66.

⁽²⁾ 14 Q. B., 710.

⁽³⁾ 1 Q. B., 467.

⁽⁴⁾ 8 E. & B., 529.

⁽⁵⁾ 12 Q. B., 960.

the court really was without jurisdiction. *Philipson v. Earl of Egremont* ⁽¹⁾ shows that the Superior Court has power to do what the inferior might do. Excess of jurisdiction may be shown to the court above upon affidavit. We are not precluded from showing this, because on the face of it, the order purports to be within the jurisdiction: *Crepps v. Durdan*, in *Smith's Leading Cases*, where the cases are collected in the note ⁽²⁾; *Re Penny and South Eastern Railway Company* ⁽³⁾.

*There were many circumstances which the appel- [435
lants ought to have disclosed to the Mining Court, but which they kept out of view.

The debt was not really due by the company or by the shareholders, but by those who incurred it without authority: *Cherry v. Colonial Bank of Australasia* ⁽⁴⁾. In the present case, the bank, after having substantially abandoned its legal proceedings from the consciousness that it was impossible for it to get a judgment, surprised the court into making an order. The manager had for three years ceased to be such; the company had become amalgamated with another, and had notoriously given up its original business: *Smith v. Bank of Victoria* ⁽⁵⁾. The action, being defended, was not pressed, because the plaintiffs knew that the debt had not been legally contracted, and therefore hoped to get contributions *pro rata* from individual shareholders, many of whom were probably directors, and liable under *Cherry's Case*.

The service of the notice was not properly made at the place where the company had ceased to carry on business: *In re Manchester Assurance Association* ⁽⁶⁾.

As soon as the shareholders heard of the proceedings they applied to the Judge of the Mining Court, but he refused to act because the order was not made *ex parte*. The resolution of the 10th of June, 1867, not to arrange this debt until after the contemplated amalgamation, was the resolution of the directors, not of the shareholders. The bank ought to have disclosed that the debt was not duly contracted; and the circumstances amounting to fraud, the Supreme Court was entitled to vacate the order. If individual shareholders had been sued, they might in each action have pleaded that the judgment had been obtained by fraud upon the court, and by the collusion of the manager, who, by not giving notice to the shareholders, suffered the judgment to be obtained:

⁽¹⁾ 6 Q. B., 587.

⁽²⁾ 1 Sm. L. C., 666 (8th ed.).

⁽³⁾ 7 E. & B., 660.

⁽⁴⁾ Law Rep., 3 P. C., 24.

⁽⁵⁾ 41 L. J. (P.C.), 84.

⁽⁶⁾ Law Rep., 9 Eq., 648.

and if they might plead this separately, why should not the court be applied to by motion to dispose of the whole subject at once? *Philipson v. Earl of Egremont* ⁽¹⁾; *Bosanquet* 436] v. *Graham* ⁽²⁾. *Even if that argument bears rather upon the powers of the Court of Mines on appeal, or on review, to vacate its own order improperly obtained, either by stating falsehood or suppressing the truth, still the Superior Court has power to do whatever the inferior court would do, if the inferior court has been imposed upon: *Earl of Bandon v. Becher* ⁽³⁾; *Tommey's Case* ⁽⁴⁾; *Sheddon v. Patrick* ⁽⁵⁾.

Mr. *De Gez*, Q.C., in reply: This was not an appropriate mode of questioning such a transaction for fraud. The decision of Mr. Bowman, refusing the review, might have been appealed from to the Chief Judge of the Mining Court, and from him to the Privy Council. It is clear upon the enactments that an appeal lies, even if the terms are not perfectly express. In this country there was no appeal from the decisions of the Insolvent Debtors Court up to 1861, when the jurisdiction of that court was transferred to the Court of Bankruptcy. An appeal had lain in bankruptcy cases from the Court of Bankruptcy to the Court of Chancery; and a question arose whether after the transfer such an appeal lay in insolvent cases, there being no express provision to that effect in the act of transfer. Lord Cranworth decided in the affirmative in *Ex parte Perkins* ⁽⁶⁾, because the jurisdiction to wind up was given to a court from which, in its own practice, an appeal lay: in the matter of the *Cardiff and Caerphilly Iron Company, Gledhill's Case* ⁽⁷⁾; *West Ham Distillery Company, Whittel's Case* ⁽⁸⁾. In this country the local courts of bankruptcy had authority to make winding-up orders, but the Court of Queen's Bench never interfered to question their orders upon *certiorari*. Another objection to the order of the Supreme Court is that others besides the bank and the company were interested in the winding-up order, but were not before the Supreme Court: *Underwood's Case* ⁽⁹⁾; *Upfill's Case* ⁽¹⁰⁾; *Bright v. Hutton* ⁽¹¹⁾.

437] *Formerly the manner in which jurisdiction has been exercised might be questioned upon *certiorari*, though the jurisdiction itself was undoubted; but now where *certiorari* has been taken away, as it has been in many cases by statute, and as it has been here, the High Court can, on *certio-*

⁽¹⁾ 6 Q. B., 587.

⁽²⁾ 6 Q. B., 601, n.

⁽³⁾ 3 Cl. & F., 479.

⁽⁴⁾ 4 H. L. C., 313.

⁽⁵⁾ Law Rep., 1 H. L., Sc. 535.

⁽⁶⁾ 34 L. J. (Bkcy.), 37.

⁽⁷⁾ 3 De G. F. & J., 713.

⁽⁸⁾ 2 De G. & J., 577.

⁽⁹⁾ 5 De G. M. & G., 677.

⁽¹⁰⁾ 2 H. L. C., 674.

⁽¹¹⁾ 3 H. L. C., 341.

rari, only question the decision of the Lower Court on the ground of fraud or want of jurisdiction appearing on the face of the record: *Reg. v. Bolton* ⁽¹⁾; *Brittain v. Kinnaird* ⁽²⁾; *Mould v. Williams* ⁽³⁾. The doctrine of *Reg. v. Bolton* has not been at all shaken by *Thomson v. Ingham* ⁽⁴⁾, or *Reg. v. St. Olave* ⁽⁵⁾. It has happened the higher court has found that the lower court was without jurisdiction, for various reasons; in *Reg. v. Cheltenham Paving Commissioners* ⁽⁶⁾, and *Reg. v. Recorder of Cambridge* ⁽⁷⁾, because some of the magistrates were personally interested; in *Reg. v. Arkwright* ⁽⁸⁾, because notice had not been given; in *Re Penny and South Eastern Railway Company* ⁽⁹⁾, because the subject matter was not within their jurisdiction. In the case of *Crepps v. Durden* ⁽¹⁰⁾ the defect of jurisdiction appeared on the face of the conviction itself. The case of *Philipson v. Earl of Egremont* ⁽¹¹⁾ is one where there was a plea of fraud and collusion within the court itself in obtaining a judgment; not in another court; and here no plea of fraud or collusion is put upon the record; nor does the respondent in his affidavit charge collusion of his own knowledge.

A decision obtained by fraud may be treated as invalid in various ways: it may be set aside on rehearing or appeal by the court which pronounced it, or the court to which appeal lies, or it may be neglected or disregarded by another court as a mere nullity, and that other court may refuse to give effect to it: *Earl of Bandon v. Becher* ⁽¹²⁾; not make an order to quash it. The case of *Sheddon v. Patrick* ⁽¹³⁾ is rather in our favor, for the prior judgment was held to be binding though there had been some reserve on the part of those who obtained it.

*[SIR ROBERT P. COLLIER referred to the case of [438 *Welch v. Nash* ⁽¹⁴⁾.]

That is not a case of *certiorari*. It was only that the legality of the order of the justices might be questioned in an action of trespass. It is explained by the case of *Reg. v. Grant* ⁽¹⁵⁾. The winding-up order is not illegal under the Colonial statutes, because made *ex parte*; the proposition that the finding of a matter of fact which is within the jurisdiction of the justices would not be conclusive if the party

⁽¹⁾ 1 Q. B., 66.

⁽²⁾ 1 B. & B., 432.

⁽³⁾ 5 Q. B., 469.

⁽⁴⁾ 14 Q. B., 710.

⁽⁵⁾ 8 E. & B., 529.

⁽⁶⁾ 1 Q. B., 464.

⁽⁷⁾ 8 E. & B., 637.

⁽⁸⁾ 12 Q. B., 960.

⁽⁹⁾ 7 E. & B., 660.

⁽¹⁰⁾ 1 Smith's L. C., 666, see the note.

⁽¹¹⁾ 6 Q. B., 587.

⁽¹²⁾ 3 Cl. & F., 479.

⁽¹³⁾ Law Rep., 1 H. L., Sc. 535.

⁽¹⁴⁾ 8 East, 394.

⁽¹⁵⁾ 14 Q. B., 62.

did not appear, is contrary to *Ex parte Hopwood* ⁽¹⁾ and *Ex parte Williams* ⁽²⁾.

As for the alleged concealment, there is nothing to show that the appellants knew anything about the informality of the resolution, nor was it necessary for them to inquire: *Turquand v. Royal British Bank* ⁽³⁾; *Fountain v. Carmarthen Railway Company* ⁽⁴⁾; *Agar v. Athenæum Life Assurance Society* ⁽⁵⁾; *Prince of Wales Assurance Society* ⁽⁶⁾; *County Life Assurance Company's Case* ⁽⁷⁾. It was merely taking over an old debt, and there is nothing to show that the original debt was not formally contracted: *Omnia rite acta præsumuntur*. Drawing checks for the current expenses of the bank is not such borrowing as requires to be formally authorized by the shareholders: *Waterlow v. Sharp* ⁽⁸⁾.

[SIR MONTAGUE E. SMITH: That is a strong case.]

It has never been shown that the company had a good defence to the action brought by the bank; the minute of the 21st of June, 1867, is practically an admission of the debt. There could be no fault in the appellant's not suing for it; the respondent Willan himself there treats it as something to be settled afterwards; and it is set out as a debt in the books of the company. The case of the *Cefn Cilcen Mining Company* ⁽⁹⁾ is in point; likewise *In re Magdalena Steam 439 Navigation Company* ⁽¹⁰⁾. *The notice was certainly short, but there had been a formal demand in August, three months before. The act does not require the petition to be filed before the summons issues. There is no wrong recital in the order to wind up, though there was a wrong recital in the notice. If the company had required time to answer they could no doubt have got it.

Their lordships reserved their judgment, which was now pronounced by

SIR JAMES W. COLVILLE: This is an appeal against an order of the Supreme Court of the colony of Victoria which, upon a return to a writ of *certiorari*, quashed an order that had been made on the 18th of November, 1871, by the then Judge of the Court of Mines for the mining district of Beechworth, for the winding-up of the Golden Gate Gold Company, Registered. The appellants are the Colonial Bank of

⁽¹⁾ 15 Q. B., 521.

⁽²⁾ 2 L. M. & P., 580.

⁽³⁾ 5 E. & B., 248; Ex. Ch., 6 E. & B., 327.

⁽⁴⁾ Law Rep., 5 Eq., 316.

⁽⁵⁾ 3 C. B., 725.

⁽⁶⁾ E. B. & E., 222.

⁽⁷⁾ Law Rep., 5 Ch. App., 288.

⁽⁸⁾ Law Rep., 8 Eq., 501.

⁽⁹⁾ Law Rep., 7 Eq., 88.

⁽¹⁰⁾ Joh., 690.

Australasia, the creditors on whose application the winding-up order was made; and the official agent for the liquidation of the company under that order. The respondent is one of the shareholders of the company.

This company was, in the month of May, 1865, incorporated under the provisions of the local statute passed in the preceding year (No. 228 of the 27th Vict.), and known as the Mining Companies Limited Liabilities Act, 1864.

It must be assumed that all the requirements of that statute were complied with; and, in particular, that a manager was appointed under the 6th section; that the company was duly registered in the Court of Mines for the district of Beechworth under the 9th section; and that it had, at least for some time, a registered office, to which all communications and notices might be addressed pursuant to the 15th section of the act. There were several changes in the person of the manager, the last registered manager being a Mr. William Scott.

office of the company up to the date of the winding-up order.

The office first registered was No. 37, Market Street, Melbourne, and that continued to stand on the register as the

That order was also made under the provisions of the Mining *Companies Limited Liability Act, 1864, as [440 amended in 1867 by a subsequent statute, No. 324 of the 31 Vict. It was made by the judge of the district wherein the company was registered, and therefore by the judge having general jurisdiction over the subject-matter.

Before they consider the grounds upon which the Supreme Court has made this order, their lordships will deal with some objections that have been taken to the action of the Supreme Court in this matter.

It has been argued that the Supreme Court had no power to issue a writ of *certiorari* to bring up the proceedings of the Judge of the Court of Mines.

That the Supreme Court has a general power to issue the writ to any inferior court in the colony, coextensive with the like power of the Court of Queen's Bench in this country, is indisputable, and was finally admitted at the bar.

It was, however, contended, 1st, that the Courts of Mines are not inferior courts; and, 2dly, that if they are inferior courts, the power to issue a *certiorari* to them has been taken away by statute.

[His lordship here stated the leading provisions of the local statutes of 1857, 1864, and 1865, which relate to the Courts of Mines (').]

(¹) *Supra*, pp. 422, 423.

Upon a review of these different enactments, and the consideration of the arguments addressed to them, their lordships have come to the following conclusions :

1. That these Courts of Mines, which have been created by acts of the local legislature, and with a jurisdiction which, however wide, is limited both as to the persons and the matters within the colony over which it is to be exercised, must, on the principle laid down by Lord Holt in *Rex v. Inhabitants of —*, in Glamorganshire ⁽¹⁾, be taken to stand in relation to the Supreme Courts on the footing of inferior courts ; and

2. That the power to issue a *certiorari* to these courts in respect of any proceeding under the Mining Statute, 1865, has been taken away by statute.

441] *It was, however, argued that a winding-up order made by the Judge of a Mining Court under the provisions of the Mining Companies Limited Liability Act, 1864, was not a proceeding under the Mining Statute, 1865, inasmuch as the latter contains no express reference to that particular jurisdiction, or to the orders made thereunder. And it therefore became material to consider whether an appeal to the Chief Judge of Mines against such an order could be preferred under the act of 1865 ; since, if such an appeal would lie, the order itself would obviously be a proceeding under the act. The words of the 172d section are very general. They are "any party to any suit in any Court of Mines, or to any proceeding before the judge of any such court (except where the contrary is herein provided) who shall be dissatisfied with any decree or order of the said court, or with the order of a judge thereof, not being an order of commitment made by such court or judge, may appeal from the same to the Chief Judge." They are, therefore, wide enough to embrace an appeal by the shareholders of a mining company against an order made by a Judge of a Court of Mines for winding up the company upon such a proceeding as that prescribed by the 28th and following sections of the Mining Companies Limited Liability Act, 1864. And it may be remarked that the wording of this 172d section differs herein from that of the 71st section of the repealed statute of 1857 ⁽²⁾, which gave an appeal from the decrees and orders of the Courts of Mines to the Supreme Court in terms that might well be taken to be confined to decrees and orders in regular suits. And it seems reasonable to suppose that the ampler terms of the more recent enactment were purposely used, in order to embrace the orders

(1) 1 Ld. Raym., 580.

(2) *Supra*, p. 419.

made under the provisions of the intermediate statute of 1864.

It may further be observed that the act of 1867, which amended that of 1864, by its 4th section, expressly provided that "All orders made by the Court of Mines, or the judge thereof, under any of the provisions of the latter statute, might be enforced in like manner in which any order or decree of the Court of Mines in any suit pending therein might be enforced;" and, consequently, expressly applied to such orders the machinery of executions *contained in the [442 4th subdivision of the second part of the Mining Statute, 1865.

Their lordships are, therefore, of opinion that winding-up orders must be taken to be within the scope of the 244th section of the act (¹), and that the power to remove the proceedings relating to them into the Supreme Court has been taken away by statute.

It is, however, scarcely necessary to observe that the effect of this is not absolutely to deprive the Supreme Court of its power to issue a writ of *certiorari* to bring up the proceedings of the inferior court, but to control and limit its action on such writ. There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen's Bench will grant a *certiorari*; but some of those authorities establish, and none are inconsistent with, the proposition that in any such case that court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it.

Some of these authorities will be hereafter considered. At present it is sufficient to mention that of *Reg. v. St. Olave* (²), which supports both these propositions.

It does not, however, appear that the Supreme Court of Victoria has, in the present case, asserted the right to exercise powers in excess of what has been just laid down. Their lordships understand the final judgment of that court to state, as the grounds upon which the order ought to be quashed, that the Judge of the Court of Mines who made it had acted without jurisdiction, and that he had been misled into doing so by the fraud of the petitioning creditors. The question upon this appeal is whether the materials before the court justified either conclusion. And as these two points, want of jurisdiction in the judge, and fraud in the party procuring the order, are essentially distinct, it will be well to consider them separately.

(¹) *Supra*, p. 423.

(²) 8 E. & B., 529.

In order to determine the first it is necessary to have a clear apprehension of what is meant by the term "want of jurisdiction." There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction 443] to exercise that jurisdiction *depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings or brought before the superior court by affidavit, are extrinsic to the adjudication impeached. But an objection that the judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The superior court cannot quash an adjudication upon such an objection without assuming the functions of a court of appeal, and the power to retry a question which the judge was competent to decide.

Accordingly, the authorities, of which *Reg. v. Bolton* (¹), and *Reg. v. St. Olave* (²), may be taken as examples, establish that an adjudication by a judge having jurisdiction over the subject-matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein; and that the Court of Queen's Bench will not on *certiorari* quash such an adjudication on the ground that any such fact, however essential, has been erroneously found. Nor is anything to be found in the cases which have been cited at the bar, or, so far as their lordships are aware, in any other decided case, which is really inconsistent with the proposition just stated. In *Reg. v. Cheltenham Paving Commissioners* (³), the objection was that the court which passed the order was improperly constituted, inasmuch as three of the magistrates who were interested took part in the decision. And *Reg. v. Recorder of Cambridge* (⁴), proceeds on the same ground.

(¹) Q. B., 66.

(²) 8 E. & B., 528.

(³) 1 Q. B., 467.

(⁴) 8 E. & B., 637.

*Again, in *Reg. v. Arkwright* ⁽¹⁾, the objection was [444 that certain notices which, on the true construction of the statute, ought to have preceded the inquiry, were not given until after the adjudication; and, consequently, that the order had been made in the absence of that which the legislature had made an essential preliminary to the exercise of jurisdiction.

In cases which fall within the principles of the last-mentioned decisions the question is, whether the inferior court had jurisdiction to enter upon the inquiry, and not whether there has been miscarriage in the course of the inquiry.

There is a third class of cases, in which the judge of the inferior court, having legitimately commenced the inquiry, is met by some fact which, if established, would oust his jurisdiction and place the subject-matter of the inquiry beyond it. To this category belong such cases as *Thomson v. Ingham* ⁽²⁾, which was much relied upon in the argument; *Pease v. Clayton* ⁽³⁾, and *Reg. v. Stimpson* ⁽⁴⁾. In all these cases the inferior court, being incompetent to try a question of title, was bound to hold its hand when a *bona fide* dispute as to title arose before it. And the general rule in such a case is that stated in the passage from the judgment of the Exchequer Chamber in *Bunbury v. Fuller* ⁽⁵⁾, which is cited by Mr. Justice Blackburn in *Pease v. Clayton*. "It is a general rule that no court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make such a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question its decision must always be open to inquiry in the superior court." And, accordingly, the cases show that the decision of the inferior court on such a point is examinable either on formal proceedings in prohibition, as in *Thomson v. Ingham* ⁽²⁾, or in an action of trespass, as in *Pease v. Clayton* ⁽³⁾, or on *certiorari*, as in *Reg. v. Stimpson* ⁽⁴⁾. Whether the [445 court, in the latter case, would have exercised its summary jurisdiction by quashing the order if there had been evidence on which the magistrates might have reasonably concluded

⁽¹⁾ 12 Q. B., 960.

⁽⁴⁾ 4 B. & S., 301.

⁽²⁾ 14 Q. B., 710.

⁽⁵⁾ 9 Ex., 111.

⁽³⁾ 3 B. & S., 620.

that the question of title was not raised *bona fide*, may be doubtful.

All these cases, however, leave untouched the authority of *Reg. v. Bolton* ⁽¹⁾, and that class of cases; and the question is within which class the present case falls.

The first ground upon which the rule *nisi* to quash the winding-up order was granted was, that there was no jurisdiction to make the order, as at the time of serving the notice of demand, and of making the said order, the Golden Gate Gold Mining Company, Registered, was not indebted to the Colonial Bank of Australasia in any sum; and the judgment of the Supreme Court upon which this rule *nisi* was made absolute, found that "there was no petitioning creditors' debt proved, and that there was, therefore, no foundation for the winding-up order."

The order, however, of the 18th of November, 1871 ⁽²⁾, is, on the face of it, strictly regular. It recites that on the 11th of August, 1871, the Colonial Bank of Australasia had served on the mining company a demand, under their seal, requiring the company to pay the sum of £2,223 11s. 8d. then due to the bank, and that the company had, for the space of three weeks succeeding the service of that demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the bank. It further recites that, on the 18th of November, 1871, the bank had presented their petition, setting forth the facts before recited, and praying that the company might be wound up; that an affidavit verifying the petition had been filed in court; that the mining company had been duly served with a notice to appear and show cause why the judge should not make an order in the terms of the statute; that it had failed to appear or show any sufficient cause as required by the notice; and states that therefore, upon the hearing of the said petition, and upon reading the said affidavit, and upon proof as well as of the facts and matters aforesaid as that the said sum was then due from the said company to the said 446] *Colonial Bank of Australasia; and upon hearing counsel for the said bank, he (the judge) ordered that the said company should be wound up forthwith. The order, then, was one made by a competent judge; showing, on the face of it, that every requirement of the statute under which it was made had been complied with; ordering that which the judge, on proper grounds, had power to order; and containing an express adjudication upon a fact which, though essential to the order, the judge was both competent and

⁽¹⁾ 1 Q. B., 66.

⁽²⁾ *Supra*, p. 424.

bound to decide, viz., that the sum claimed to be due to the petitioning creditors was then due to them from the mining company. Nor can it be said that there was no evidence to support this finding, since the affidavit filed in support of the petition distinctly swears to the debt.

This being so, it seems to follow that the Supreme Court could only arrive at the opposite conclusion upon a retrial of the question of the petitioning creditors' debt, and that upon evidence which was not before the inferior court. To do this, and to quash the order upon a conclusion thus drawn, is clearly contrary to the principles established by *Reg. v. Bolton* ⁽¹⁾ and that class of cases. Their lordships are, therefore, of opinion that the order under appeal cannot be supported on the ground that there was no jurisdiction to make the order of the 18th of November, 1871, because no petitioning creditors' debt was proved.

The respondent, however, also relies on the second ground stated in the order *nisi*, viz., that the sum mentioned in the winding-up order was not, nor was any part thereof, due to the bank by the mining company; and that the order was obtained by undue and improper means, calculated to deceive the judge who made the same, and to prevent the company from showing reasons to the judge for refusing to make the order, and that so the order was obtained by fraud on the said judge.

The case of fraud made by the affidavits, and insisted upon by the learned counsel for the respondent at the bar, is shortly this: "It is not disputed that, in May, 1866, the mining company had, by its manager or other person or persons professing to act on its behalf, overdrawn its account with a bank called the Union Bank, and that, on the 7th day of that month, it was resolved at a meeting, *pro- [447 fessing to be an extraordinary meeting of the shareholders, that the banking account should be removed from the Union Bank to the Colonial Bank of Australasia, and that Mr. Hogarth, one of the shareholders, should wait on the manager of the Colonial Bank and make arrangements with him regarding the overdraft to the Union Bank. Nor is it disputed that, in consequence of the arrangements so made, the Colonial Bank paid to the Union Bank the amount of the overdraft, and that the debt claimed to be due from this mining company at the date of the winding-up order was the amount so paid with the interest that had accrued thereon.

It was, however, contended that, inasmuch as there is no proof of any resolution sanctioning the borrowing of money

(1) 1 Q. B., 66.

except that of the 7th of May, 1866; and that resolution, if it implied such sanction, was passed at an extraordinary meeting of the shareholders which had neither been regularly convened nor duly advertised pursuant to the provisions of the 23d section of the Mining Companies Limited Liability Act, 1864; there was an absence of that sanction to the borrowing of money which is required by the 21st section of the same act; and, consequently, that the transaction with the Colonial Bank was not binding on the shareholders of the mining company; and the debt proved was not the debt of the company. It was further alleged that the bank having in the month of September, 1866, commenced an action against the mining company for the recovery of this debt, was met by a defence (the precise nature whereof is not stated on the affidavits), and after various postponements had failed to proceed further with that action.

It was further stated that the mining company had been "virtually defunct" since the 10th of June, 1868, having permitted its claim to be sold to another company; that the manager about that time ceased to be employed by the company, or to draw his salary; and that the name of the company was then or soon after taken down from No. 37, Market Street. And it was suggested, if not positively alleged, that the bank knowing all these facts, and with the object of obtaining the amount due to them, which they knew they could not recover in the actions, had fraudulently entrapped the judge into making the winding-up order, by serving the demand and the notice required by the statute, 448] and *recited in the order upon the manager, and at the office of the defunct company; the notice being purposely framed so as to give the company an unusually short period within which to appear and show cause against the making of the winding-up order.

Their lordships, after a full consideration of the case as disclosed in the affidavits, and of the arguments addressed to them, are not satisfied that there is any ground for imputing fraud to the Colonial Bank. The gist of the supposed fraud is that the bank was seeking to recover from the shareholders, by means of these proceedings taken behind their backs, a debt for which they were not liable; and which the bank knew it could not otherwise recover against them. Their lordships, however, are by no means prepared to say that the company (meaning thereby the shareholders) was not liable to repay to the bank the money which the latter had unquestionably advanced for the purposes of the company. The respondent relied on the case of *Cherry and*

Another v. The Colonial Bank of Australasia (*). In that case the appellants, two of the directors of a mining company, had written a letter to the bank, stating that they had authorized Clarke, the manager, to draw checks on account of the company. Clarke overdrew the account, and the company having repudiated their liability for the overdraft, the bank sued the appellants on the warranty to be implied from their letter. The case proceeded on the assumption that Clarke had not such authority, and the directors were held to be personally liable on the implied warranty. There seems, therefore, to be nothing in that authority which governs the present case. On the other hand, the cases of *Royal Bank v. Turquand* (*); *Fountaine v. Carmarthen Railway Company* (*); and *Agar v. Atheneum Life Insurance Company* (*), are authorities for holding that it was not incumbent on the bank, before it advanced the money, to satisfy itself that all the proceedings of the mining company and its shareholders *inter se* had been strictly regular. The money so advanced was advanced at least two years before the mining company is alleged to have transferred its claim, or to *have ceased to carry on business. It was advanced in order to free the company from an existing liability, the debt then due to the Union Bank, which the shareholders could not have resisted, if they could have resisted it at all, without destroying the credit of their company. Again, it appears from the affidavit of Mr. Bouilly that the action was suspended in consequence of negotiations with the shareholders for the payment of the debt; and, as regards the respondent, it appears that on the 21st of June, 1867, he, as chairman of the board of management, signed a minute in which it was resolved, in answer to a letter from the bank demanding the debt, "that no steps be taken to arrange matters with the Colonial Bank until the amalgamation" (presumably the amalgamation with the other mining company), is finally completed. Their lordships, therefore, are unable to affirm on a summary proceeding, at the instance of this respondent, that the mining company were not liable to the bank for this debt, or that the bank must be taken to have known that they were not liable.

In this state of things it was unquestionably open to the bank, acting fairly, to abandon the further prosecution of the action, and to take the steps indicated by the latter part of the 28th section of the Mining Companies Limited Lia-

(*) 6 Moore P. C. C. (N.S.), 235; Law Rep., 3 P. C., 24.

(*) 5 E. & B., 248; 6 E. & B., 321.

(*) Law Rep., 5 Eq., 316.

(*) 3 C. B. (N.S.), 725.

bility Act, 1864, in order to obtain an order for the winding-up of the company. In doing this it was bound, under the statute, to serve as it did the demand and the notice upon the registered manager at the registered office of the company. The company which had taken no steps formally to wind up its concerns, but had left the name of its manager and the description of the office to stand on the register, cannot be heard to say that the first was not its officer, nor the second its office. Then, can the shortness of the notice be treated as conclusive evidence of fraud? The judgment of the Supreme Court does not so treat it; and upon the application to set aside the order which was tried in August, 1872, before the Deputy Judge, Mr. Bowman, that notice was ruled to be legally sufficient. Nor does it appear that, if a much longer notice had been given to the manager, the shareholders and especially the respondent would have acted upon it. On what then does the finding that the judge was imposed upon by the petitioning creditors rest? They made a regular [450] application for a winding-up order; they swore to *a sufficient debt; they gave a sufficient notice to the opposite party, on whose failure to appear the order was made. Their lordships cannot see that the bank was bound to inform the judge that some of the shareholders were contesting their liability for this debt, on grounds of which it is sufficient to say that it is extremely doubtful whether they constitute a legal defence. Their lordships are therefore of opinion that no fraud is established against the bank, and that that ground for granting the order also fails.

Their lordships desire to add that, even if the conduct of the bank had been such as to raise in their minds a much stronger suspicion of unfairness, they would nevertheless have thought that the Supreme Court ought not summarily and on *certiorari* to have quashed the winding-up order on that ground. The Court of Queen's Bench, whose exercise of this jurisdiction is discretionary, would certainly not quash an order of an inferior court upon the ground of fraud in the procuring of it, unless the fraud were clear and manifest. Here the question whether a fraudulent use had been made of the machinery for winding-up registered companies, was a complicated one, dependent on a variety of circumstances capable of explanation and requiring nice consideration. In such a case the parties, conceiving themselves to be aggrieved, ought to have been left to other and more formal remedies. Such remedies were open to them. Their lordships cannot but think that, on a proper application, the Judge of the Court of Mines who made the order would,

on a suggestion of fraud, have had power to review it. They are not satisfied that it might not have been reviewed generally by the Deputy Judge on the occasion of the application made to him in August, 1872, under the 3d section of the act No. 324, although both parties seem to have then concurred in thinking that, under that enactment, the order could not be set aside unless it had been made *ex parte*. Again, for the reasons before given, their lordships are disposed to think that an appeal against the order to the Chief Judge of the Court of Mines would have lain; and lastly, it is clear that, failing any of the above remedies, if the bank had made a fraudulent use of the process of the Mining Court, the parties aggrieved might have had their remedy by regular suit in the Supreme or other competent Court.

*For the above reasons their lordships are of opinion [45] that the order of the Supreme Court quashing the winding-up order cannot be supported. And they will humbly recommend Her Majesty to reverse that order, and to direct that, in lieu thereof, an order be made discharging the rule to show cause of the 22d of November, 1872, with costs. The appellants must also have their costs of this appeal.

Solicitors for the appellants: *Gamlen & Son*.

Solicitors for the respondent: *Paine & Hammond*.

Where a corporation has power to do an act, and does it, it is presumed in favor of a *bona fide* holder, for value, that it was done lawfully, until the contrary be proved: *Mechanics' Bank v. Spring Valley, etc.*, 25 Barb., 419, reversing 13 How. Pr., 227; *Connecticut, etc., v. Cleveland, etc.*, 41 Barb., 10, 26, and cases cited; *Broom's Leg. Maxims*, 907 marg. p.; *Houghton v. Dodge*, 5 Bosw., 326, affirmed 28 How. Prac., 270; *Chautauqua Co. Bank v. Risley*, 19 N. Y., 370; *Elliott v. Dodge*, 33 Barb., 336; *Gillett v. Campbell*, 1 Denio, 520; *Carroll v. Cone*, 40 Barb., 220; *Robb v. Ross Co. Bank*, 41 Barb., 586; *Belden v. Meeker*, 2 Lansing, 471; *City of Lexington v. Butler*, 14 Wall., 232. And so where a claim for over \$1,000 cannot be transferred without a resolution of the board of directors, such resolution will be presumed until the contrary is shown: *Nelson v. Eaton*, 26 N. Y., 410; 16 Abb. Prac., 113. See *McCullough v. Moss*, 5 Den., 567.

But if it be affirmatively shown no such resolution was passed, the transfer would be invalid: *Hoyt v. Thompson*, 3 N. Y., 320; *Murray v. Vander-*

bilt, 39 Barb., 141; *Smith v. Hall*, 5 Bosw., 319. Unless such restriction were imposed by the laws of another state of which the transferee would not be bound to take notice: *Hoyt v. Thompson*, 19 N. Y. Rep., 208, 224-6. Or the instrument had been passed to a *bona fide* holder: *Elliott v. Dodge*, 33 Barb., 336; *Central Bank v. Lang*, 1 Bosw., 202; *Ogden v. Andre*, 4 Bosw., 583, affirmed 24 How. Prac., 610; *Hope, etc., v. Taylor*, 2 Robertson, 278; *Farmers' Bank v. Watson*, 32 N. Y., 585; *Safford v. Wyckoff*, 4 Hill, 442; *Curtis v. Leavitt*, 15 N. Y. Rep., 11.

But the claimant must show affirmatively that he is a *bona fide* holder for value: *Houghton v. McAuliffe*, 26 How. Prac., 270.

The debtor cannot avail himself of the objection that a transfer of his indebtedness was made without a resolution of the board of directors: *Belden v. Meeker*, 2 Lansing, 471; but see *Nelson v. Eaton*, 16 Abb., 119, 26 N. Y., 415.

Unless he show the transferee is not a *bona fide* holder without value: *Smith v. Hall*, 5 Bosw., 319.

[Law Reports, 5 Privy Council Cases, 451.]

J.C. (1), March 17, 20, 1874.

JAMES MARKE WOOD, the Younger, Owner of the Ship "Birmah," and Others, Appellants; and GEORGE SMITH, and Others, Owners of the Screw Steamship "City of Cambridge," Respondents.

THE "CITY OF CAMBRIDGE."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY.

Compulsory Pilotage—Exemption from Liability under 17 & 18 Vict. c. 104, s. 388—Duties of Pilot and Crew.

When the employment of a pilot is within the provisions of s. 139 of the Mersey Docks Consolidation Act, 1858, such employment is compulsory.

The object of the master, when the vessel left the dock, was to get to sea as soon as he could, and he arranged with the pilot that the vessel should anchor in the Mersey for the night, but should go so far on the way as would enable her to cross the bar on the next morning's tide:

Held, that the ship was proceeding to sea within the meaning of s. 139 at the time she left the dock, and that the anchoring was not a discontinuance [452] *of her progress to the sea, but an act proper and reasonable to be done in the course of it.

The 138th section of the act does not relate to the giving of extra remuneration to those pilots only who are voluntarily engaged.

It may happen that a pilot who is compulsorily engaged under the 139th section of the act by a ship proceeding to sea, may, by the ship's detention in the river, become entitled to extra remuneration under the 138th section.

The doctrine laid down in *The Christiana* (2) and *The Lochlibo* (3) concerning the relative duties of pilot and crew, recognized and approved.

THIS was an appeal from the Court of Admiralty, in a cause of damage promoted by the appellants, the owners of the vessel Birmah, and by the owners of the cargo laden therein, and by the master and crew, for their money, clothes, and private effects, against the screw steamship or vessel City of Cambridge, her tackle, apparel, and furniture, for the recovery of damages in respect of losses sustained by the appellants by reason of a collision which happened between the Birmah and the City of Cambridge in the river Mersey, at about 2.30 a.m., on the 27th of February, 1873.

The facts of the case, the principal arguments urged, and authorities cited at the hearing of the appeal, are fully set forth in the judgment.

The appeal was argued by

(1) *Present*.—SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

(2) 7 Moore's P. C. Cases, 171

(3) 7 Moore's P. C. Cases, 430.

Mr. *C. Butt*, Q.C., and Mr. *W. C. Gully*, for the appellants.

Mr. *Milward*, Q.C., and Mr. *E. C. Clarkson*, for the respondents.

Judgment was delivered by,

March 20., SIR MONTAGUE E. SMITH: This is a suit brought by the owners of the ship *Birmah* against the owners of the steamship the *City of Cambridge*, to recover the damages occasioned by a collision between the two ships. The collision was of a disastrous character, for the effect of it was that the *Birmah* with a valuable cargo was sunk.

The questions in the appeal relate to the construction of certain **pilotage* clauses in the *Mersey Docks Consolidation Act*, 1858, and to the relative duties of the crew and pilot who were on board the *City of Cambridge*. [453]

The facts are, that the *Birmah*, a homeward bound vessel, had anchored in the *Mersey*, off *Egremont*. She was lying there at anchor at the time of the collision, and no blame is attributable to her. The *City of Cambridge* left the *Morpeth Dock*, on a voyage to *Calcutta*, at or about eleven o'clock on the night of the 26th of February in charge of a licensed pilot of *Liverpool*. She was fully equipped and prepared for sea. It appears that the pilot had been hired whilst the vessel was in the dock to take her out to sea, and he came on board and took charge of her before she left the dock. It had been arranged between the master and the pilot that the ship should not cross the bar on that night, but should go into the *Mersey* and be anchored there ready to cross the bar on the morning tide, and it is in evidence that the state of the weather was such that she could not have crossed the bar on the following morning's tide, unless she had been taken out of dock and placed in the *Mersey* so far on her way. The *City of Cambridge* having been taken out of the dock, was brought up opposite *Woodside Ferry*, and was there anchored by a single anchor, the port anchor. The vessel was swung first to the flood, and then to the ebb tide, but had not been brought to her proper state, and on to the ebb tide, when the pilot left the deck to go to the *chart-house* to lie down. Shortly afterwards the vessel took a heavy sheer, the effect of which was to throw her across the tide, and the strain upon her anchor broke the chain, and the vessel went adrift. There was a strong wind at this time, and a heavy tide running down, and the wind and tide were opposed. The ship's anchors and chains were of usual size and strength. The mate and a proper number of the crew

were on deck. As soon as the cable parted, the mate went to the chart-house, which was under the bridge, to tell the pilot, who had left directions that he should be called in case anything went amiss. The pilot came at once upon deck, and finding the state of the ship, and that she was drifting broadside down the river, or nearly broadside, he thought the right course was to put her under steam and endeavor to bring her end on to the tide. He was not successful *in that manœuvre, and he afterwards dropped the starboard anchor. That anchor did not hold. It appears to have nipped the ground only, and the pilot in that state of things allowed the vessel to drift down the river. He had her so far under command, that he used the steam power and the helm to avoid the various vessels which he passed in his downward course, but ultimately the vessel drifted between the North Star and the Birmah. He was able to avoid the North Star, but the vessel whilst so drifting was driven against the Birmah with such violence that the Birmah was sunk.

It was not disputed upon the argument that the collision was due to the negligence of some persons on board the City of Cambridge. There are two questions to be considered in the case: first, whether the employment of the pilot before and at the time of the collision was compulsory by law; and, secondly, assuming it to be so, whether the collision was attributable exclusively to the want of care or skill of the pilot.

Now it is admitted that the pilotage would be compulsory in this case, and that the owners would be entitled to the exemption from liability provided in the 388th section of the Merchant Shipping Act⁽¹⁾, if the circumstances were such as to bring the case within the 139th section of the Mersey Docks Consolidation Act, 1858. That section is ill drawn, and the construction of it is by no means free from difficulty. But it is the legislation under which the pilotage in the great river Mersey has been conducted for many years, and the construction put upon the clause has been, that when the circumstances bring a vessel within it, and the employment of a pilot is under its provisions, such employment is compulsory. The clause is this,—“In case the master of any vessel, being outward bound, and not being a coasting vessel in ballast, or under the burden of 100 tons,

(1) “No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any quali-

fied pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law.”

for which provision is otherwise made, shall proceed to sea, and shall refuse to take on board or to employ a pilot, he shall pay to the pilot, who shall first offer himself to pilot the same, the full pilotage rate that would have been payable for such vessel if the pilot had actually *piloted [455 the same into or out, as the case may be, of the said port of Liverpool, together with all expenses incurred in recovering the same.

The question is, whether this vessel was proceeding to sea, so that the employment of the pilot was compulsory, before and at the time of the collision. When the ship left the dock, the object of the master was to prosecute his voyage by getting to sea as soon as he could. It is true it had been arranged between the pilot and himself that the vessel should anchor in the Mersey for the night, but that was done to further the object of getting out to sea by going so far on the way as would enable her to cross the bar on the next morning's tide, which the vessel could not have done if she had remained in dock, or at least she could not have crossed it so early. Their lordships think that under these circumstances the ship was proceeding to sea within the meaning of the act at the time she left the dock, and that the anchoring was not a discontinuance of her progress to the sea, but an act proper and reasonable to be done in the course of it.

It was argued that the employment of the pilot fell under the 138th section, which relates, it was said, only to the voluntary engagement of pilots. That clause is, "If the master of any vessel shall require the attendance of a pilot on board any vessel during her riding at anchor, or being at Hoylake, or in the river Mersey, the pilot so employed shall be paid for every day or portion of a day he shall so attend the sum of 5s. and no more." This part of the clause no doubt relates only to the voluntary employment of a pilot; but the latter part of it relates not only to such voluntary employment, but to the extra remuneration to be given to a pilot when he is compulsorily employed under the 139th section. The proviso is this, "Provided that the pilot who shall have the charge of any vessel shall be paid for every day of his attendance whilst in the river, but no such charge shall be made for the day on which such vessel being outward bound shall leave the river Mersey to commence her voyage, or being inward bound, shall enter the river Mersey." Now the pilot in the present case was not hired under the first part of this clause. His attendance was not required for the sole purpose of remaining on board during

456] the time the vessel was riding at anchor. He was *engaged to take the vessel to sea. The proviso in the section may be applicable to his remuneration, because, although he was hired to take the vessel to sea, if, in the course of taking her to sea, any delay took place by which she remained a day in the river, he would be entitled to the extra payment which is provided by that section. So far from such a payment being necessarily an incident of a voluntary employment only, it is obvious that the clause assumes that the pilot may be compulsorily employed; that the rate fixed for taking the vessel out to sea, which is fixed according to a scale having relation to the size of the vessel, may be insufficient to remunerate him; and provides when he is delayed for an extra remuneration. It by no means follows that the pilotage was not compulsory under the 139th section, because the pilot might be entitled to extra remuneration under sect. 138.

It was said that the 139th clause would not have been infringed if the employment of the pilot had been delayed until the vessel left her anchorage on the following morning. But if the employment be compulsory upon the vessel proceeding to sea, and a fixed remuneration to the pilot be also obligatory on the master, he surely must be entitled to have the services of the pilot at the commencement of, and throughout the vessel's progress to sea, so as to get the full benefit of the compulsory payment.

The view taken by their lordships of this act does not in the least conflict with the decisions in the *Attorney-General v. Scaith* (¹) and *Rodrigues v. Melhuish* (²). Those were both cases of vessels remaining at anchor, intending to remain at anchor, and not instances of vessels proceeding to sea. In the case of *Rodrigues v. Melhuish*, this passage occurs in the judgment of the Lord Chief Baron Pollock. He says, "It was contended by one of the learned counsel on the part of the owners, that if a pilot were taken on board a vessel previous to her leaving the dock, whilst she was in the act of quitting it with the intention of going to sea, no step being necessary except the different operations requisite for her to go on, the vessel in such case would be said to be proceeding to sea. If this vessel had had all her cargo on board, and the master had been ready to get on board, and she had had everything ready to commence her voyage 457] forthwith, and had left her berth with *that intention, it might no doubt have been said that she was proceeding to sea from the time she first left her berth." The case sup-

(¹) 13 Price, 302.

(²) 10 Ex., 117.

posed by the Lord Chief Baron is very like the actual case here. Their lordships think that the City of Cambridge was proceeding to sea from the time she first left her berth, and that there was no break in the continuity of her progress to sea after she so left it and before the collision.

The next question is whether, assuming the employment of the pilot to have been compulsory, the collision is solely attributable to the default of the pilot. Now the remote cause of the disaster was the vessel parting from her anchor by the breaking of the chain cable, and the proximate cause was allowing the vessel to drift down the river so as to come into collision with the Birmah. The breaking of the cable was caused by the vessel having sheered when being swung to the tide and bringing too great a strain upon the cable. This was found in the court below to be mainly due to the improperly short length of cable which had been let out, sixty fathoms only. Allowing the vessel to drift in a crowded river like the Mersey was also found by the court below to have been an improper and unskilful mode of managing the vessel which brought about the collision. It was also the opinion of the judge of the Admiralty Court that this drifting of the ship was not a necessary consequence of the first parting with the anchor, inasmuch as there was sufficient steam-power at hand to have allowed of her being navigated into a safe anchorage.

Their lordships see no reason to disagree with any of the above conclusions of fact, and they concur in the opinion of the court below that the pilot is alone to blame for the mismanagement of the ship in the instances just referred to. Indeed, it was not disputed that the length of the cable proper to be let out, and the manœuvring of the ship after she parted with her anchor, were matters entirely within his province.

It was contended, however, that the master and crew were to blame or partly to blame in three respects. It was said the quartermaster ought not to have allowed the vessel to sheer when at anchor. It has been already stated that the pilot left the deck before she had fully swung to the tide. Upon this point the court below found as follows: "The Elder Brethren think also *that the pilot was to blame [458 for leaving the deck when he did; that he ought not to have gone away into the chart-room when she was three quarters swung to the ebb tide; he ought to have waited till she was fully swung, and himself superintended that manœuvre, and seen that her helm was properly put. He left her helm amidships. No blame attaches to the City of Cambridge

with respect to the men that were left on deck ; there seem to have been sufficient men and they were properly placed. It is to be observed, that when the vessel swung, the wind and tide were opposed, and no blame at all attaches, in the opinion of the Elder Brethren, with which I agree, to Boyle, the quartermaster, in the manœuvre which he effected. He executed the right manœuvre in counteracting the sheer the vessel had taken, and there was no delay in executing it,"—what he did was to starboard the helm,—“nor is there any reason to suppose that the pilot, if he had been on deck instead of in the chart-room, would have directed anything to be done different from what was done in his absence. Their lordships concur in that finding.

Another ground of blame is that a good look-out was not kept by the crew when the vessel was drifting, and particularly that they did not report the Birmah. It is unquestionable that, as a rule, it is the duty of the crew of the ship to keep a look-out, and to assist in that way the pilot in charge. But in the present case the court below have found that there was no want of look-out, and their lordships agree with this finding. The master was on the bridge with the pilot, and the Birmah was seen and reported by him to the pilot, and both had her in view for a considerable time before the collision.

The only remaining imputation on the crew is, that as soon as the chain of the port anchor broke, the starboard anchor ought to have been at once let go. This may have been a right manœuvre, or it may be, that as the vessel was athwart the tide, it was better to use the steam at command, so as to get her head to the tide, as the pilot afterwards attempted to do. She was to some extent athwart the tide when she originally sheered and the cable snapped, and no doubt at the moment when the cable snapped her head flew still farther to the west. She was, therefore, to a great degree broadside to the tide at the time when it is suggested 459] that *the anchor ought to have been dropped. But, however that may be, it was a manœuvre that was properly within the province of the pilot to judge of and direct. If he had not been at hand, it would have been the duty of the officers of the ship at once to have acted, and dropped the anchor, if it had been a proper measure ; but in this case the pilot was at hand. It is true that he had gone to the chart-house to lie down, but he had given directions to be called if anything went amiss. In point of fact he felt the jerk caused by the snapping of the cable, and came to the chart-house door as soon as the mate, who instantly ran to

him, reached it, and very shortly afterwards he was on deck. Now, although it would have been the duty of the officers of the ship to act at once if there had been immediate necessity for so doing, as, for instance, to prevent a collision which was imminent, their lordships think it cannot be said that the emergency was so pressing, or the measures to be adopted so plain, that they were not justified in resorting to the pilot in charge of the ship when he was so near at hand. The dangers of a divided command are great, and must be taken into account in dealing with questions of this kind.

The relative duties of the crew and pilot were discussed in two cases, which are to be found in the 7th Moore. The first is *The Christiana* ('). In that case Mr. Baron Parke, in giving the judgment of the Committee, says: "The duties of the master and the pilot are in many respects clearly defined. Although the pilot has charge of the ship, the owners are most clearly responsible to third persons for the sufficiencies of the ship and her equipments, the competency of the master and crew, and their obedience to the orders of the pilot in everything that concerns his duty, and under ordinary circumstances we think that his commands are to be implicitly obeyed. To him belongs the whole conduct of the navigation of the ship, to the safety of which it is important that the chief direction should be vested in one only." Then there being a question about the neglect to set the stay sail and jib under the circumstances in which the ship was placed, the learned judge says: "The pilot has unquestionably the sole direction of the vessel in those respects where his local knowledge is presumably required. The direction, the course, the manœuvres of the vessel when sailing [460 belong to him; and the Trinity Masters therefore rightly decided that the neglect to set the stay sail and jib, after the *Christiana* was driven from her anchorage, was the fault of the pilot alone. It was also his sole duty to select the proper anchorage place and mode of anchoring and preparing for anchoring, as was held to be clear in the case of *The Gipsy King* (*). And in the case of *The Lochlibo* (*), Lord Kingsdown, in giving the judgment of the Committee in that case, it being a question whether the vessel ought to have sailed through the Downs, says: "It was contended at the bar that in this case the impropriety of sailing through the Downs was so manifest that the captain ought to have refused, in spite of the pilot's opinion, to permit the ship to proceed, but we cannot assent to this. It would be very

(') 7 Moore's P. C. Cases, 171.

(*) 7 Moore's P. C. Cases, 430.

(*) 2 Wm. Rob., 537.

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dangerous to hold that there can be any divided authority in the ship with reference to the same subject; and whether the ship was to anchor or to proceed was a matter which we think belonged exclusively to the pilot to decide."

Their lordships, therefore, have come to the conclusion that as regards this point of blame, none is properly imputable to the crew. Being of this opinion, it becomes unnecessary to consider the further point urged by the respondent's counsel, namely, that this default, if established, was too remote from the immediate cause of the collision to render the respondents liable for the consequences of it. But it is to be observed that in the interval between the time when the vessel parted from her anchor and the collision she was under the control of the pilot, who might, if he had employed the engine power at his command, have given her a new and independent course which would have avoided the collision.

In the result their lordships will humbly advise Her Majesty that the judgment of the court below ought to be affirmed, and this appeal dismissed, with costs.

Solicitor for the appellant: *W. W. Wynne.*

Solicitors for the respondents: *Gregory, Rowcliffes & Co.*

[Law Reports, 5 Privy Council Cases, 482.]

J.C. (1), March 20, 21, 1874.

482] *GIOVANNI DAPUTO, of Genoa, in the Kingdom of Italy, Shipowner, the Owner of the Bark or Vessel "PIEVE SUPERIORE," Appellant; and Messrs. JAMES WYLLIE & Co., of No. 13, Leadenhall Street, in the City of London, Merchants, and Messrs. O. TYNE & Co., of Bremen, Merchants, Respondents.

THE "PIEVE SUPERIORE."

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND.

Admiralty Court Act, 1861, s. 6—Liability of Ship for Breach of Contract where Goods carried into English port.

Where a petition on protest is filed on the ground of want of jurisdiction, before the plaintiff's petition setting forth the particulars of his damage, the petition on protest ought to state the facts which show want of jurisdiction.

The general words of clause 6 of the Admiralty Court Act, 1861, "any claim . . . for any breach of contract on the part of the owner, &c., of the ship" have relation to the contract in the bill of lading.

(1) *Present*: SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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Where the parties contemplated that the goods would, or at least might, be carried into and delivered in an English port, and it was so provided by the bill of lading signed by the master at Rangoon, in pursuance of a charterparty made in England, and the master in fact put into an English port for orders in part fulfilment of the contract of carriage; the jurisdiction, at least in respect of then existing causes of suit, arose when the goods were so carried into port, and was not taken away by the ship being subsequently sent to a foreign port to be discharged.

The 6th section of the Admiralty Court Act, 1861, does not confer a maritime lien. It only gives to the Court of Admiralty jurisdiction to entertain a suit either *in personam* or *in rem* by arrest of the ship whenever it comes within reach of process. The arrest cannot avail against any valid charge on the ship, nor against a *bona fide* purchaser.

The Admiralty Court Act, 1861, being intended to remedy a grievance, by amplifying the jurisdiction of the English Court of Admiralty, ought to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow.

THIS was an appeal from the Court of Admiralty, rejecting the admission of a petition on protest to the jurisdiction of the court filed by the appellant.

*The appellant was the owner of an Italian bark, [483 called the *Pieve Superiore*. The *Pieve Superiore* having been arrested by the respondents, the appellant appeared under protest to the jurisdiction of the court, and filed the petition in question, setting out the grounds on which he submitted that the High Court of Admiralty had no jurisdiction in the suit.

The petition stated in effect, that pursuant to charterparty, dated London, the 30th of March, 1872, and Genoa, the 6th of April, 1872, between the defendant and Ferdinand Schiller, for self and partners of Messrs. Borradaile, Schiller & Co., of Calcutta, the said ship proceeded to Rangoon, and there loaded a cargo of rice in bags, for which the master of the said vessel signed and delivered a bill of lading, the material parts of which were as follows:

"Shipped in good order and well conditioned, by Gladstone, Wyllie & Co., in and upon the good ship or vessel called the *Pieve Superiore*, whereof is master for this present voyage, Consigliere, and now riding at anchor in the Rangoon River, and bound for Belle Isle, Scilly, Queenstown, or Falmouth, for orders to discharge at a port in the United Kingdom, or on the Continent between Havre and Hamburg, both inclusive, 5,000 bags rice, each 210 lbs. net, 5,300 bags, each 198 lbs. net, being marked and numbered as per margin, and are to be delivered in the like good order and condition at the aforesaid port of _____, as ordered (all and every the dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever excepted), unto order or to its assigns, he or they paying freight for the said goods at the rate of, &c."

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The vessel sailed with the cargo from Rangoon, and her master, in the exercise of his option, proceeded therewith to the port of Falmouth for orders, and there received orders from the plaintiffs or their agents to proceed with the said cargo to Bremen, and to discharge the said cargo at Bremen, which the master accordingly did. The vessel afterwards left Bremen on a new voyage for Cardiff, where she arrived, and where she was arrested by the plaintiffs. The plaintiffs alleged themselves to be assignees for valuable consideration of the bill of lading, and alleged that the cargo of rice 484] suffered damage in the vessel, and that they had *instituted the suit as such assignees for the recovery of losses which they alleged themselves to have sustained by negligence or misconduct, or by breach of duty or breach of contract on the part of the master or crew of the vessel.

The defendant submitted that the said cargo of rice was not carried into any port in England or Wales within the true intent and meaning of the 6th section of the Admiralty Court Act, 1861, and prayed the judge to pronounce against the jurisdiction of the court, and to dismiss the suit with damages and costs.

The 6th section of the Admiralty Court Act, 1861, is as follows: "The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof, by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales; provided, &c."

The respondent having moved for the rejection of the petition, the Judge of the Admiralty Court made an order rejecting the admission of the petition with costs, and ordering the appellant to enter an absolute appearance in the cause, but he gave leave to the appellant to appeal.

From this order an appeal was brought to Her Majesty in Council.

The appeal now came on to be heard.

Mr. *Milward*, Q.C., and Mr. *E. C. Clarkson*, for the appellant: This foreign ship has been arrested, but did nothing to bring itself within the jurisdiction of the Court of Admiralty. It merely called at Falmouth for orders, which it might have got without going into port. The act did not intend to give jurisdiction where the ship merely

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calls with goods in her, but does not bring in the goods as goods, for the purpose of doing something to them, and at a place where they are deliverable, or become deliverable, or disposable. If there is jurisdiction because she has merely called, *and it can be enforced ever after, even when [485 the ship's company is dispersed and their evidence no longer available, it would be very difficult to do justice under such a law. The legislature is not likely to have intended to attach any such liability to a foreign ship for merely calling. This is different from the case where the master has brought the goods to England and refuses to carry them farther. It is not said where the breach of contract was committed; we are entitled to assume that it was not in England. In the case of *The Bahia* (¹) the master had clearly carried the goods in; he had put into Ramsgate and landed the cargo, but refused to deliver it. We do not say that delivery is necessary to give jurisdiction, but the goods must have been brought in. In the case of *The Patria* (²), a foreign ship remained three months at Falmouth. The shipper was entitled to his goods, and they were in this country in pursuance of their original destination. Until the terminus is designated, it is no part of the contract to deliver at that terminus; the generality of the words "carried into" must be limited in some way; the carrying in must be with intention to deliver. As to the remark in the judgment of the court below, that there is jurisdiction by reason of the ship having previously called in England, courts are not to act in consequence of some wrong done after the ship has left England. The charter-party was executed at Genoa, the shippers were at Calcutta; the ship would not have been liable if it had changed hands. No time is assigned for the supposed wrong. The carrying in cannot apply to entering a mere roadstead, as might happen at Plymouth; it must mean carrying into a real port where goods are to be dealt with as if they were imported goods, in fact, to the terminus of the goods. *The Teutonia* (³) went into port to avoid the French; here they went in for orders, the ship having the goods aboard was a mere accident; they might have stayed outside and sent in for orders.

Upon the construction contended for by the respondents, if a steamer has a right to stop and coal at an English port, as the Bremen and New York steamers call at Southampton, then the goods *on board of her are carried in; and [486

(¹) Bro. & Lush., 61.

(²) Law Rep., 3 A. & E., 436, 459.

(³) Law Rep., 4 P. C., 171.

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she would fall within sect. 6, whereas the proper jurisdiction over her would be at her terminus. Goods which are still on board are as if in foreign territory, the ship being here only for a limited purpose. A general ship may take in her cargo at different ports, and while doing so, or calling to coal, she might be arrested before she had performed the substantial part of her voyage, and so the goods of shippers would be interfered with, for damage, perhaps, to a few goods. The English legislature could not have intended to enact such a law for the ships of other nations.

Mr. C. Butt, Q.C., Mr. Cohen, Q.C., with whom was Mr. Gainsford Bruce, for the respondents: The jurisdiction is given only where there is no owner domiciled in England and Wales. The case of *The Two Ellens* (*) shows that it does not create a maritime lien. There is nothing against international law in the Admiralty Act, s. 6; an English ship may, under the general maritime law, be arrested abroad, and Dr. Lushington states the liability of foreign vessels under sect. 6, without the limitation which has been suggested, to the place where the ship delivers cargo. We allow that it is not a carrying in if the master deviates from his voyage for his own purposes, or is driven by stress of weather. It does not appear that the terms of the act are to be set aside where the ship merely calls for orders. In the case of grain, though not of every kind of cargo, the goods are examined by brokers, who report to London, and upon their report purchases are made by the merchants; therefore ships must call at ports, where it is usual to examine the cargo. A ship from abroad is seldom a general ship, but commonly one person charters the whole: *Ireland v. Livingstone* (*). It is admitted that where a ship is to call for orders, the whole ship is not chartered. In *The Ironsides* (*), Dr. Lushington explains the 6th section of the act. In *The Bahia* (*), he says that the words "carry into" were designedly used instead of "import;" and this passage, which, being of the date 1863, 487] may almost be called a *contemporaneous exposition of the statute, is cited by the present judge of the Admiralty in the case of *The Patria* (*). It is admitted that if goods are bonded by the act of the master, that might render the ship subject to the jurisdiction. In the case of *The Patria* (*) the captain went in for one reason, he remained for another reason; he never made Falmouth the terminus

(*) Law Rep., 4 P. C., 169.

(*) Law Rep., 5 H. L., 410.

(*) Lush., 458.

(*) Bro. & Lush., p. 62.

(*) Law Rep., 3 A. & E., 436, 459.

(*) Ibid., 438.

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of his voyage, and stood out for wages under the German law during detention. In the case of *The Teutonia* (') Lord Justice Mellish adverted to the 6th section of the Admiralty Act as the foundation of the court's jurisdiction. There is nothing in sect. 6 to prescribe that the cargo shall be discharged, or brought to the port of destination. The ordinary words of a bill of lading speak of carriage and delivery as two different things. It is said that the damage may, for anything that appears, have taken place between Fal-mouth and Bremen; but if any one knows the fact it is the shipowner, and he ought to have shown it; but he does not even allege that the fact was so. The person objecting to the jurisdiction is bound to make out his objection. The plaintiffs are not foreigners. It would be injustice if it were possible for a ship to go away without liability after injuring or throwing away the cargo, before the consignee has a right to demand possession of it. As to the argument from inconvenience, a demand such as ours must be answered in the courts of some country, and why not in the English courts? The literal meaning of the words favors our contention.

Dr. Lushington's observations in *The Ironsides* (') show that the intention was to revive the old jurisdiction of the Admiralty, which it had lost, and to put it on the same footing with foreign courts.

In the case of *The Bahia* (') the goods were, no doubt, landed, but the decision would have been equally good if they had been kept on board.

The legislature sought to apply a remedy where the persons liable do not reside here. In this it has not gone beyond what the law does in attaching the goods of non-residents in London and elsewhere to found jurisdiction.

Mr. *Milward*, Q.C., in reply.

*1874. May 21. Their lordships reserved their judgment, which was delivered by

SIR MONTAGUE E. SMITH: This is an appeal from an order of the judge of the High Court of Admiralty, rejecting a petition on protest to the jurisdiction of the court, in a cause *in rem* instituted against the ship *Pieve Superiore*, for damage to cargo under the 6th section of the Admiralty Court Act, 1861.

The facts alleged in the petition on protest are: that the appellant, the owner of the ship, lived in Genoa; and that on the 30th March, 1872, a charterparty was made in London between him and Mr. Schiller, on behalf of the house

(') Law Rep., 4 P. C., 171.

(²) Lush., 458.

(³) Bro. & Lush., 61.

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of Borradaile, Schiller & Co., merchants of Calcutta, by which it was agreed the ship should proceed to one of certain named ports in India, and there load a cargo of rice in bags, for which the master was to deliver bills of lading. The ship accordingly went to Rangoon, and was there loaded by Messrs. Gladstone, Wyllie & Co., with a cargo of rice; and in pursuance of the charter, the master signed bills of lading, describing the ship to be "bound for Belle Isle, Scilly, Queenstown, or Falmouth, for orders to discharge at a port in the United Kingdom, or on the Continent between Havre and Hamburg," and making the cargo deliverable to order, or assigns, on payment of freight at the rate of £3 15s. sterling per ton. It is further alleged that the ship went into the port of Falmouth, with her cargo, for orders; and whilst lying in that port, the master received orders to go to Bremen to discharge; that she went there and discharged her cargo, and afterwards sailed to Cardiff on a new voyage, and was arrested in that port in the present suit.

The concluding paragraphs of the petition are the following:

"The plaintiffs allege themselves to be assignees, for valuable consideration, of the said bill of lading; and allege that the said cargo of rice suffered damage in the said vessel; and they have instituted this suit as such assignees for the recovery of losses which they allege themselves to have sustained by negligence or misconduct, or by breach of duty, or breach of contract, on the part of the master or crew of the said vessel.

489] *"Save as aforesaid, the said cargo of rice was never brought into any port in England or Wales.

"The defendants submit that the said cargo of rice was not carried into any port in England or Wales within the true intent and meaning of the 6th section of the Admiralty Court Act, 1861; and that by reason thereof this honorable court has not jurisdiction to entertain this suit."

The petition on protest being filed before the plaintiff's petition setting forth the particulars of his damage, ought to state the facts which show want of jurisdiction. But this petition does not allege whether the misconduct or breaches of contract complained of arose before or after the ship left the port of Falmouth. It is consistent with it that the causes of complaint, or some of them, arose before she left that port; and their lordships think it must be assumed that this may have been so in dealing with the question raised by the protest. The only objection taken to the jurisdiction is "that the said cargo of rice was not carried into any port in

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England or Wales within the true intent and meaning of the 6th section of the Admiralty Court Act, 1861."

The section is as follows: "The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee, or assignee, of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods, or any part thereof, by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales."

Their lordships are satisfied that this enactment does not confer a maritime lien, for the reasons given in the judgment of this Committee upon the effect of the previous clause of the act (the 5th) in the case of *The Two Ellens* ('). The clause in question does no more than give to the Court of Admiralty jurisdiction to entertain suits in cases that can be brought within its scope, and which, it is to be observed, may be instituted *in personam* as well as *in rem*.

*The clause is undoubtedly framed in large and [490] general terms, and Dr. Lushington, a judge of high authority, in a judgment delivered soon after the passing of the act, thought it was intentionally so framed: *The Bahia* (').

It was insisted for the appellant, and not denied by the respondent's counsel, that the words "carried into any port" must receive some limitation, otherwise, it was said, if a ship with cargo on board, being under no obligation to enter an English port, was driven to take refuge in such a port by stress of weather or other accident, the jurisdiction would be founded. The learned counsel for the appellant, however, felt great difficulty in defining what the limitation should be, but ultimately contended that to bring a claim within the clause, the goods must be carried into a port in England or Wales, for the purpose of delivery, or in which, from circumstances, they become deliverable. The latter branch was introduced with reference to some decisions which had upheld the jurisdiction, notwithstanding that the entry into an English port was not contemplated by the contract. But supposing the suggested definition to be correct so far as it goes, their lordships are not prepared to hold that it contains an exhaustive interpretation of the clause.

Cases must frequently arise at ports of call and intermediate ports, giving occasion for the remedy it was intended to afford to English merchants against foreign shipowners,

(') Law Rep., 4 P. C., 169.

(') Br. & Lush., 61.

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by proceedings in the English Court of Admiralty. Besides the instances where causes of action have arisen before the arrival of the ship at such ports, take the cases of damage done to goods, or of unjustifiable delay, in the port of call itself; or the case of a ship bound, without calling for orders, to go direct to London to discharge her cargo, and the master improperly putting into some other English port, and refusing to take the cargo on. Instances of this kind would certainly be within the scope of the mischief intended to be dealt with; and their lordships are reluctant in construing the act so to interpret words, large enough in their ordinary meaning to embrace such cases, as to exclude them from its operation, and thus leave foreign masters who may have broken their contracts free to take away their ships 491] from this country in the sight of *English consignees, who would be powerless, as they were before the act, to stop them.

The legislature has used the words "carried into any port in England or Wales," and may have done so designedly to meet cases of the kind to which reference has just been made. It has said nothing of delivery, nor of the purpose for which the goods may be carried into port. The general words of the clause "any claim . . . for any breach of contract on the part of the owner, &c., of the ship" must undoubtedly be construed to have relation to the contract in the bill of lading: and it may have been the intention of the legislature to give the jurisdiction only in the case of claims arising on contracts to carry the cargo to some port in England or Wales. It is not, however, necessary to consider whether the operation of the act ought to be limited to this extent, for if it were there would not be an absence of jurisdiction in the present suit. In this case the parties contemplated that the goods would, or at least might, be carried into and delivered in an English port, and the bill of lading signed by the master at Rangoon, in pursuance of a charterparty made in London, so provided. The master in fact put into the port of Falmouth for orders in part fulfilment of the contract of carriage, and might, in further fulfilment of it, have been ordered to discharge there, or at some other English port. Their lordships think that under these circumstances the jurisdiction, at least in respect of then existing causes of suit, arose when the goods were so carried into the port of Falmouth, and was not taken away when the ship was subsequently ordered to a foreign port to be discharged.

If the jurisdiction of the Court of Admiralty over the claim once attached, that court, in their lordships' opinion, would

be competent at any subsequent time to entertain a suit either *in personam* or *in rem* by arrest of the ship whenever it came within reach of its process. They therefore think, assuming the jurisdiction to have once attached, that it was competent to arrest the ship in this suit on her arrival upon a new voyage at Cardiff. The arrest, however, there being no maritime lien, could not avail against any valid charges on the ship, nor against a *bona fide* purchaser; for, as already stated, the object of the statute is only to found a jurisdiction against the owner who is liable for the damage, *and to give the security of the ship, the *res*, from the [492 time of the arrest. This is clearly explained by Dr. Lushington in *The Alexander Larsen* (*), and *The Pacific* (*), and by this Committee in *The Two Ellens* (*).

The statute being remedial of a grievance, by amplifying the jurisdiction of the English Court of Admiralty, ought, according to the general rule applicable to such statutes, to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow. And the decisions upon it have hitherto proceeded upon this principle of interpretation.

One of the earliest decisions (*The Bahia*) (*) gives the widest interpretation to the word "carried." In that case the cargo was consigned to Dunkirk. The ship, in consequence of an accident, put into the port of Ramsgate, and the master refused to carry on the cargo to Dunkirk or to give delivery at Ramsgate. It was there contended by the defendant's counsel, but without success, that the words "carried into any port in England," meant so carried under a contract to that effect. In upholding the jurisdiction of the English Court of Admiralty, Dr. Lushington, after stating the facts, said: "That this is a great grievance cannot be denied, and the court ought to give, if necessary, great latitude to the construction of the act of Parliament, in order to extend the remedy to this case. However, it appears to me that the section was carefully worded to give the utmost jurisdiction in the matter. It uses the words 'carried into any port in England or Wales,' and does not use the word 'imported.' I apprehend the phrase 'carried into' was advisedly used instead of the word 'import.'" It does not appear that this decision was appealed from.

The present Judge of the Court of Admiralty, Sir R. Phillimore, adopted the view of Dr. Lushington in deciding the case of *The Patria* (*). There, a German ship bound under

(1) 1 W. Rob., 288-294.

(2) Br. & Lush., 243.

(3) Law Rep., 4 C. P., 169.

(4) Br. & Lush., 61.

(5) Law Rep., 3 A. & E., 459.

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a bill of lading to take a cargo of coffee to Hamburg, put into Falmouth shortly after the commencement of the French and German war—Hamburg was then blockaded. On the removal of the blockade the master refused to go on to Hamburg, or to deliver the cargo at *Falmouth, and Sir R. Phillimore sustained the jurisdiction of the court over claims arising on these breaches of contract; and again there was no appeal.

There was recently another important cause in the Court of Admiralty, also arising out of the war between Germany and France, which came before this tribunal on appeal (*The Teutonia*)⁽¹⁾. In that case, the *Teutonia*, a German vessel, called at Falmouth, one of the ports of call under the bill of lading, for orders, and was ordered to Dunkirk to discharge. On nearing the French port she found that war was imminent, and put back to Dover. She was again directed to go to Dunkirk, but the master refused to go there, or to deliver the cargo at Dover without payment of freight. For this refusal a suit was brought against the ship in the English Court of Admiralty under the clause in question. It failed on the merits, but the previous decisions were, apparently, acquiesced in, for no objection was taken to the jurisdiction.

In the cases of *The Bahia* ⁽²⁾ and *The Patria* ⁽³⁾, the arrival at an English port was not contemplated by the contract, and the ships put into our ports by reason only of circumstances extrinsic to it, nor did they then enter them for the purpose of discharging their cargoes, which only in any sense became deliverable there by reason of the subsequent refusal of the master to take them on to the port of destination. Their lordships, in pointing out the distinction between these cases and the present, must not be understood to question their authority. They are fully sensible of the difficulty of construing this loosely drawn clause, and giving a satisfactory interpretation of it. It is sufficient for them to decide that under the circumstances of this case, to which they have above adverted, the objection taken *in limine* to the jurisdiction is not, upon the facts disclosed in the protest, sustained.

For these reasons their lordships think the order of the Judge of the High Court of Admiralty is right, and they will humbly advise Her Majesty to affirm it, and to dismiss this appeal with costs.

Solicitor for the appellant: *Thomas Cooper*.

Solicitors for the respondents: *Pritchard & Sons*.

⁽¹⁾ Law Rep., 4 P. C., 172. ⁽²⁾ Bro. & Lush., 61. ⁽³⁾ Law Rep., 3 A. & E., 459.

[Law Reports, 5 Privy Council Cases, 501.]

J.C.(¹), May 5, 1874.

***THE CHARTERED BANK OF INDIA, AUSTRALIA, AND [501
CHINA, Appellants; and CHARLES PATON HENDERSON
and COLIN GEORGE ROSS, trading under the style or firm
of C. P. HENDERSON & Co., Respondents.**

ON APPEAL BEFORE THE SUPREME COURT OF HONG KONG.

Bill of Lading—Secret Trust—Assignment without Notice—Consideration.

A., a merchant in London and in Hong Kong, purchased goods for shipment from B., and paid for them by his acceptance of B.'s draft against the shipment, on the terms that A. should send them to his firm at Hong Kong, and that the proceeds should be remitted to A. in bills specially to meet such acceptance.

A.'s firm at Hong Kong owed a large sum to C., and were under engagement to secure the debt by depositing shipping documents with him. Being threatened by C. with immediate legal proceedings, they promised him that if he would forbear to take such proceedings, and would release them from their obligation to deposit shipping documents, they would deposit with him a bill of lading for goods of a certain value, upon the understanding that the bill of lading, or the goods represented therein, should be returned to them upon payment of a sum equivalent to the value thereof. The bill of lading of the goods purchased from B. was accordingly indorsed to C., who had no knowledge of the terms made with B., and it was returned by C. according to agreement, on receipt of an equivalent sum:

Held (reversing the judgment of the Supreme Court of Hong Kong), that C. by such forbearance and release gave valuable consideration; that the legal interest in the goods passed by the indorsement of the bill of lading, and that B. could not enforce his claim against the proceeds of sale received by C. in respect thereof.

THIS was an appeal from a decree of the Supreme Court of Hong Kong, declaring that the respondents were entitled to have the proceeds of the sale by the appellants of certain goods, called long ells, paid to them to the extent in the decree set forth.

The respondents were merchants in Manchester, under the firm of C. P. Henderson & Co. The appellants were a banking corporation, having a place of business at Hong Kong.

*Certain persons, named George Lyall, Charles [502 Frederick Still, and George Francis Maclean, carried on business in copartnership in London, under the firm of George Lyall and C. F. Still, and in Hong Kong and in Japan under the firm of Lyall, Still & Co.

In the month of August, 1866, the London firm of George Lyall and C. F. Still and the respondents commenced doing business together on certain terms agreed upon between

(¹) *Present*: SIR JAMES W. COLVILLE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

them, the most material parts of which are stated as follows, in a letter addressed by the respondents to George Lyall and C. F. Still, on the 1st of September, 1866:

"Dear Sirs,—We shall be very happy to purchase goods for your account for shipment to your firms in China or Japan, drawing upon you either at nine months' date, or at six months renewable at three months, for the invoice value.

"Our usual mode of conducting such transactions is as follows: We ship the goods by such vessel as you shall name to the consignment of your house abroad, we handing you the bills of lading and invoices in triplicate, both for transmission to your foreign house.

"The invoices will state that the proceeds of the shipments are to be remitted to you in first-class bank bills, specially to meet your acceptance of our draft or any renewal thereof against the shipment. Your house abroad to advise us of the remittances."

On the 24th of October, 1866, the respondents wrote to the firm of Lyall, Still & Co., in Hong Kong, as follows:

"With reference to the goods which we have purchased and shipped to you on account of Messrs. George Lyall & C. F. Still, of London, upon whom we have drawn for cost of same at nine months' date, we wish to point out to you that in the headings of our invoices for those shipments it is stated that the proceeds are to be remitted by you to Messrs. George Lyall & C. F. Still, specially to meet their acceptances of our drafts (or any renewal thereof) against the shipments: we have arranged with Messrs. George Lyall & C. F. Still to continue in future to invoice all purchases on their account in the same manner; and we shall feel obliged if, in acknowledging the receipt of this letter, you will hand us your undertaking to make the remittances in accordance 503] with the terms *of the invoices. Messrs. George Lyall & C. F. Still have also further agreed that the remittances are always to come forward in first-class bank bills. We shall also be glad if, upon all occasions when you send remittances to Messrs. George Lyall & C. F. Still against the shipments, you will hand us a press copy of the letter which you write to those gentlemen, enclosing the remittances.

"We annex the form of letter which we shall be glad if you will adopt in making all remittances to Messrs. George Lyall & C. F. Still against shipments on their account. We hand the invoices and bills of lading to Messrs. George Lyall & C. F. Still, with whom we have an undertaking that they will transmit the same to you. We are," &c.

Form of letter referred to.

"Hong Kong.

"Messrs. George Lyall & C. F. Still, London.

"Dear Sirs,—We beg to wait upon you with the under-mentioned remittance, which please place to the credit of shipment outwards per " " marked on account of yourselves, and specially to meet your acceptance of Messrs. C. P. Henderson & Co.'s draft (or any renewal thereof) against said shipment.

"Yours faithfully,"

In answer thereto, the said Hong Kong firm wrote as follows:

"Hong Kong, 15th December, 1866.

"Messrs. C. P. Henderson & Co., Manchester.

"Dear Sirs,—We have the pleasure to acknowledge receipt of your favor of 24th October, in which you refer especially to the arrangements entered into between your good selves and Messrs. George Lyall & C. F. Still for the remittance from this side of cost of your shipments of goods purchased on our account. These arrangements we have now to say will be carefully attended to by us, and remittances will be made in the form appended in your letter. Copies of our letter advising remittances to our friends will be sent to you regularly.

"We are," &c.

In pursuance of the terms agreed upon, respondents shipped fifty trusses of long ells on board the Peninsular and Oriental Company's steamer Syria, on account of Messrs. G. Lyall & C. F. *Still, under a bill of lading. The said [504 bill of lading, together with an invoice for the fifty trusses of long ells, were forwarded by the respondents to the London firm of G. Lyall & C. F. Still, and by them to the firm of Lyall, Still & Co., at Hong Kong.

The heading of the invoice was as follows:

"Invoice of fifty trusses of long ells shipped by Messrs. C. P. Henderson & Co. per steamship Syria, from London to Hong Kong, and consigned to Messrs. Lyall, Still & Co. there, for realization, the proceeds to be remitted to Messrs. George Lyall & C. F. Still, London, in first-class bank bills, specially to meet their acceptance of C. P. Henderson & Co.'s draft, or any renewal thereof, against this shipment, and bought for account and risks of Messrs. George Lyall & C. F. Still, London."

The acceptance mentioned in the heading was for £2,060 12s. 1d. sterling, the price of the goods and expenses of shipment. This was dishonored at maturity, and the re-

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spondents had not, at the date of the transactions after mentioned, been paid for the goods.

During the month of November, 1866, the appellants purchased from the firm of Lyall, Still & Co., for the sum of £15,000 sterling, certain bills of exchange drawn by that firm upon a firm trading in England under the name of Chalmers, Guthrie & Co., upon the understanding and agreement that the advance should be covered by shipping documents for silk or other China produce. The sum of £15,000 sterling was paid in advance by them to Lyall, Still & Co. at the time they purchased the bills, upon the promise and understanding that the shipping documents should be delivered before the departure of the next outgoing mail for Europe.

The firm of Lyall, Still & Co., failed to deliver the said shipping documents, notwithstanding that they were urgently pressed to do so by the appellants, and having been threatened by the appellants with immediate legal proceedings in the event of their failing to fulfil their said contract without further delay, promised the appellants that if they would abstain from commencing legal proceedings against them, and would consent to release them from their engagement to furnish the said shipping documents for silk and other China produce, and allow the said sum of £15,000 sterling, which had 505] been paid to them in advance for the said *bills upon the faith of their undertaking to deliver the said shipping documents as aforesaid, to constitute an ordinary debt for money lent, they would deposit with the appellants other security for the repayment of the said sum; and they offered to deposit with the appellants at once, in part fulfilment of such proposed substituted arrangement, a bill of lading for goods of the value of \$10,000, or thereabouts, which they stated had already been sold by them to arrive, upon the understanding that the said bill of lading, or the goods represented therein, would be returned to the firm upon payment by them to the appellants of a sum equivalent to the value thereof.

The appellants assented to the proposed arrangement in substitution of the original agreement, which the firm of Lyall, Still & Co. were unable to fulfil, and the firm in part performance of the substituted agreement and in consideration of the loan and of the original agreement, on the 14th of December, 1866, handed to the appellants the bill of lading for fifty trusses or bales of long ells, which bill of lading was indorsed by the firm, and was stated by them to represent the goods which they had sold to arrive, and which were to be redeemable by them on the terms above mentioned.

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As to the dealing with the goods, it was alleged by the respondents that the appellants took possession of the fifty trusses of long ells under the bill of lading, and realized, and converted the same into money, and received the proceeds thereof, and appropriated the same to the part liquidation and discharge of the said sum of £15,000 sterling.

The appellants, by their answer, admitted that when the fifty trusses of long ells arrived, they took possession of the goods, but they denied the foregoing statements as to the sale, and stated that the firm of Lyall, Still & Co., having paid into the appellants' bank various sums of money equivalent in the whole to the sum of \$10,000 above mentioned (which sums were mixed with the general money of the bank) the appellants gave credit in their books to the firm of Lyall, Still & Co., for an amount equal to those sums, and gave up their lien on the goods, and redelivered the same to the firm; and that during all this time they had no notice of the arrangements under which the goods* were shipped, [506 or of the invoices, or of any trust attaching thereto. Later in the same month, on the 22d of December, 1866, Lyall, Still & Co. made a general assignment of their property to the appellants and to another bank; but the transactions just stated were antecedent to, and, according to the statement of the appellants in their answer, were quite independent of, that assignment (').

In the early part of 1867, the firm of Lyall, Still & Co. stopped payment, and the partners were adjudicated bankrupts on the 23d of May, 1867, at Hong Kong.

Under the above circumstances the respondents filed their bill, whereby they sought to have it declared that the assignment of the bill of lading to the appellants was void, as being a fraudulent preference of the appellants (which ground of complaint, however, they gave up at the hearing), and they further prayed that it might be declared that all sums of money received by the appellants in respect of the fifty trusses of long ells, had been received by them in trust for the respondents, and that inquiries might be directed as to the said sums of money, and that the appellants might be decreed to pay to the respondents all the said sums of money, with interest.

The Chief Justice, in effect, decreed that the respondents were entitled to have the proceeds of the sale by the appellants of the long ells, and interest thereon at 12 per cent., paid to them, so far as the same extended, or as might be

(') See *Rodger v. The Comptoir d'Escompte de Paris*, Law Rep., 2 P. C., 393.

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necessary to recoup them the sums they had paid in taking up the bills which they had drawn for the price and the amount of commissions and incidental expenses, and interest on these amounts at 4 per cent.

The learned judge made this decree upon the ground that Mr. Kaye, the resident agent of the appellants, had when he accepted the hypothecation of the bill of lading, notice of the insolvency of the firm of Lyall, Still & Co., and that as such agent he could not (in accepting the bill of lading of the long ells, the goods in question, from the bankrupts, though the goods were then in the harbor) have any higher title to them against the respondents than the bankrupts had, and that in the bankrupts' hands the goods were clearly subject to a trust to provide by sale funds to meet the bills drawn against the goods.

507] *From this decision the defendant appealed to Her Majesty in Council.

The appeal now came on to be heard.

Mr. *Joseph Brown*, Q.C., and Mr. *H. M. Jackson*, Q.C., with whom was Mr. *F. Meadows White*, for the appellants: There have been two cases before the Privy Council arising out of the transactions between these parties, and the question is under which of the two the present appeal falls.

The cases which show how the law stands on this subject are collected in the report of *Rodger v. The Comptoir d'Escompte de Paris* ⁽¹⁾. The facts of that case were different from the present. There it was held that the words of the instrument of assignment did not carry a greater interest than the assignee had; and the bill of lading which purported to be assigned had not arrived. The real question in that case is stated to be whether value had been given for the bill of lading, the firm not having possession of the documents at the time.

The recent case, *Henderson v. Le Comptoir d'Escompte de Paris* ⁽²⁾, is parallel to the present one; the legal and equitable title were there united. We rely on the bill of exchange indorsed to us while the goods were in the harbor, whereby we became in possession.

In the recent case we gave up some documents. Here we did not give up any document; but gave up our claims to have documents, and forbore to sue. In *Rodger's Case* ⁽³⁾, the court held that the transaction of the 22d of December was governed by the rule that the assignees had no greater rights than the assignor. In *Henderson v. Le Comptoir d'Escompte de Paris* ⁽⁴⁾, the agreement was the same as in this

⁽¹⁾ Law Rep., 2 P. C., 393.

⁽²⁾ *Supra*, p. 253.

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case; and the court held that the legal claim ought to prevail against the secret trust. Where personal estate not transferable at law, is purchased from a trustee, the purchaser cannot hold it on a higher footing than the trustee.

In the present case, Henderson & Co. had a mere undertaking of an unusual kind, and unknown to those who were dealing with Lyall & Co. at Hong Kong. *Rodger's Case* proves only that the consignment was not sufficient to bar the vendor's right of stoppage **in transitu*. The law [508 recognizes certain acts which will defeat the vendor's right, and the judgment merely decided that the circumstances in that case were not sufficient to do so.

Lord Eldon contrasting land with chattels, says ('), chattels are held by possession and land by title; we actually got possession afterwards. There is a clear distinction in bankruptcy, where one security is given up in consideration of receiving another. We got our possession for valuable though not present consideration, and we are not charged with notice.

The *Attorney-General* (Sir R. Baggallay), and Mr. *Dundas Gardiner*, for the respondents: In the present case it was known to the bank that Lyall, Still & Co. were in straits. That is shown by the very nature of the transaction, when Lyall, Still & Co. offered to deposit with them the bill of lading of goods which had been sold to arrive. To give a perfect title in such a case as this, where there is a prior equity in others, there ought to be possession of the bill for value given, and there should be no notice of insolvency. Here there was no money advanced or promised; and the transaction must have been entered into in contemplation of the general assignment of Lyall & Still's property to the two banks, which was made immediately after. In the case of *Henderson v. The Comptoir d'Escompte de Paris* ('), the Judicial Committee held that it was not a conflict between different equities, but that the bank combined the legal and the equitable title. The present case is different; the principle of *Rodger's Case* (') applies. The bank admits that Lyall, Still & Co. paid off \$10,000 of their debt. Their case is, that having got possession of the goods, they sold them through Lyall, Still & Co., as agents. The sale by Lyall, Still & Co., was on their own behalf, not for the bank. The goods were sold; and the amount for which the goods were pledged was paid. They gave up their lien. Beyond doubt the respondent had a lien on the goods. Did the appellants acquire a preferable right? It is impossible

(') 13 Ves., 114.

(') *Supra*, p. 253.

(') Law Rep., 2 P. C., 393.

to believe the story as told by the bank. Probably the goods were sold by Lyall, Still & Co., but not for the bank. 509] It was better worth their while to pay *their immediate creditors at Hong Kong, than resist; so Lyall, Still & Co. themselves sold and handed over the proceeds to the bank. They were in possession of the bill, and the ship was in the harbor; by the bank's own statement it had possession of the shipping documents for a short time.

Their lordship's judgment was delivered by

SIR BARNES PEACOCK: In this case the Chartered Bank of India, Australia and China are the appellants, and Charles Paton Henderson and Colin George Ross are the respondents. The respondents were the plaintiffs in a suit brought in the court of Hong Kong against the appellants, and they sought to recover from them in that suit a sum of money which they had received under a bill of lading indorsed to them by Messrs. Lyall, Still & Co. The plaintiffs in the first paragraph of the prayer of their bill ask, "That it may be declared that the assignment of the said bill of lading to the defendant was and is void, as being a fraudulent preference of the defendants." That point is given up, and no question now arises upon it. Then in the second paragraph of the prayer they ask, "That it may be declared that all sums of money received by the defendants in respect of fifty trusses of long ells, to which the bill of lading related, have been received by them in trust for the plaintiffs." Now the question is whether the bank received the proceeds of those goods in trust for the plaintiffs or on their own account. There is no doubt that Messrs. Lyall & Still in London purchased the goods from Messrs. Henderson & Co. on the terms expressed in the letter of the 1st of September, 1866, which is set out at page 5 of the record, viz., that the invoices should state that the proceeds of the shipments were to be remitted to Messrs. Lyall & Still—they being the firm in London—in first-class bank bills specially to meet the acceptance of Messrs. Henderson & Co.'s draft against the shipment. The goods had been paid for by an acceptance of Messrs. Lyall & Still, and the stipulation was that they should send them out to their firm of Lyall, Still & Co. in Hong Kong, and that the firm there should remit the proceeds 510] to Lyall & Still in London in order that they *should therewith take up the bill which they had accepted in payment for the goods. It may be admitted for the purpose of this case that the stipulation that the proceeds of the shipments were to be remitted in first-class bills created a trust on the part of Lyall, Still & Co. not to pledge the goods,

but so to deal with them that they should obtain the value of them, and remit the proceeds for the purpose of taking up the bill. But, assuming that such a trust was created between Messrs. Lyall, Still & Co. and Messrs. Henderson & Co., the question is whether the bank were bound by that trust.

Now the bill of lading was sent out to Lyall, Still & Co., and on the 14th of December they, having it in their possession, indorsed and delivered it to the bank. The consideration for which they indorsed it is set out in the answer of the defendants. Paragraph 16 states, "The defendants admit that during the month of November, 1866, they purchased from the said firm of Lyall, Still & Co. for the sum of £15,000 sterling certain bills of exchange drawn by the said firm upon a firm trading in England under the name of Chalmers, Guthrie & Co., upon the understanding and agreement that the said advance should be covered by shipping documents for silk or other China produce; the said sum of £15,000 sterling was paid and advanced by them to the said firm at the time they purchased the said bills upon the promise and understanding that the said shipping documents should be delivered before the departure of the next outgoing mail for Europe." It appears then that the bank purchased bills of exchange to the extent of £15,000 from Messrs. Lyall, Still & Co., and that they paid them the amount upon the stipulation that Messrs. Lyall, Still & Co. were to hand them over shipping documents to the extent of the bills. They then go in paragraph 17 to show that Messrs. Lyall, Still & Co. failed to perform that agreement. They say, "The defendants do not know whether the said firm of Lyall, Still & Co. were unable to deliver to them such shipping documents as aforesaid, or to repay the said advance, but they admit that the said firm failed to do so notwithstanding that they were urgently pressed to do so by the defendants; and the said firm having been threatened by the defendants with immediate legal proceedings in the event of their failing to fulfil their said contract without further delay, *promised the defendants that if they [511] would abstain from commencing legal proceedings against them, and would consent to release them from their engagement to furnish the said shipping documents for silk and other China produce, and allow the said sum of £15,000 sterling which had been paid to them in advance for the said bills upon the faith of their undertaking to deliver the said shipping documents as aforesaid to constitute an ordinary debt for money lent, they would deposit with the defendants

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other security for the repayment of the said sum ; and they offered to deposit with the defendants at once in part fulfilment of such proposed substituted arrangement, a bill of lading for goods of the value of \$10,000 or thereabouts,"—the bill of lading in question—"which they stated had already been sold by them to arrive, upon the understanding that the said bill of lading or the goods represented therein would be returned to the said firm upon payment by them to the defendants of a sum equivalent to the said value thereof." Then paragraph 18 says: "The defendants admit that they assented to the proposed arrangement in substitution of the original agreement which the said firm of Lyall, Still & Co. were unable to fulfil as aforesaid ; and the said firm in part performance of the said substituted agreement, and in consideration of the said loan and of the said original agreement, handed to the defendant the bill of lading for fifty trusses or bales of long ells, mentioned in paragraph 18 of the said bill of complaint, which said bill of lading was indorsed by the said firm and was stated by them to represent the said goods which they had sold to arrive, and which were to be redeemable by them on the terms aforesaid."

It appears that the bill of lading was indorsed and handed over by Messrs. Lyall, Still & Co. to the bank in consideration of the bank's releasing them from the obligation which they had come under to hand over the shipping documents of the value of £15,000, and of their undertaking not to take the legal proceedings, criminal or civil, which they had threatened. It appears, therefore, to their lordships that there was a sufficient consideration for the indorsement of the bill of lading by Messrs. Lyall, Still & Co. to the bank.

Then, had the bank notice of the trust which had attached to the proceeds of those goods in the hands of Messrs. Lyall, 512] Still & Co.? The bill does not charge that they had notice of the trust or of the terms upon which the goods had been sold by Messrs. Henderson & Co. It is not found by the learned judge who tried the case that they had such notice, nor is it probable that such a notice would have been given. Messrs. Lyall, Still & Co. were under an obligation to deliver shipping documents to the bank ; they were unable to do so, and the bank threatened legal proceedings against them, and to proceed against them criminally ; and then, in order to induce the bank to stay these proceedings, Messrs. Lyall, Still & Co. say, we will treat this £15,000 as a loan, you release us from the obligation to give the shipping documents, and if you do that we will

indorse and hand over to you this bill of lading. Is it likely that when they wanted to induce the bank to release them from the obligation to deliver shipping documents and to accept the bill of lading in lieu thereof, they would have said we will hand over a bill of lading which is subject to such a trust that when the goods are sold you will not be able to receive the proceeds? It is most improbable that they would have given such a notice to the bank when they indorsed the bill of lading under the circumstances stated.

The bill of lading having been indorsed to the bank for a valuable consideration and without notice, passed the legal interest in the goods to the bank. Apparently, from the statement in the answer, the goods were actually delivered over to the bank, so that the legal interest passed to the bank not only by the delivery of the goods but by the indorsement of the bill of lading. But even assuming that the bank did not obtain actual delivery of the goods, there is no doubt that the indorsement of the bill of lading for valuable consideration passed the legal interest in the goods to the bank.

There is a distinction between this case and the one which was cited of *Rodger v. The Comptoir d'Escompte de Paris* (*). In that case the question was whether the goods could be stopped *in transitu*, and whether the indorsement of a bill of lading prevented the unpaid sellers from stopping the goods in consequence of the insolvency. Sir Joseph Napier, in delivering the judgment in that case, said: "The general rule so clearly stated and explained by *Lord St. Leon- [513 ards is, that the assignee of any security stands in the same position as the assignor as to the equities arising upon it. This, as a general rule, was not disputed; but it was contended that the case of a bill of lading is exceptional and must be dealt with on special grounds. Doubtless the holder of an indorsed bill of lading may, in the course of commercial dealing, transfer a greater right than he himself has. The exception is founded on the negotiable quality of the document. It is confined to the case where the person who transfers the right is himself in actual and authorized possession of the document, and the transferee gives value on the faith of it, without having notice of any circumstance which would render the transaction neither fair nor honest. In such a case, if the vendor is unpaid one of two innocent parties must suffer by the act of a third, and it is reasonable that he who by misplaced confidence has enabled such third person to occasion the loss should sus-

(*) 5 Moore's P. C. Cases (N.S.), 538; Law Rep., 2 P. C., 393.

tain it." His lordship cited the well-known case of *Lickbarrow v. Mason* ⁽¹⁾ as an authority for that position. Then he went on to consider whether there was any valuable consideration for the indorsement of the bill of lading, and showed that it was indorsed and handed over in pursuance of a previous agreement of the 26th of December, 1866, which is also set up in this case, by which the parties agreed to transfer all goods and bills of lading or other documents for all goods "now on the way hither, to arrive in December, 1866, or January, 1867." The bill of lading was not handed over, nor had it even arrived at the time when the agreement was entered into. Sir Joseph Napier goes on to say,—“But in this case, at the time of the assignment Maclean had not possession of the documents. Nothing was advanced on the faith of them. There is merely a general description of the documents expected to arrive, without knowing their contents, or how far they might be limited or qualified. The property of the firm in the goods expected was not only subject to special stipulations in the contracts of sale in the case of two of the three parcels, but was also subject in all the three to the lien of the unpaid vendors.” Then he says, “Doubtless the vendor’s claim cannot prevail against the claim of a transferee for value given on the [514] faith of a negotiable security *fairly and honestly taken. To the extent to which he has so given value, he has a prior claim. But the rule is founded on the reason of it as already explained, *cessante ratione cessat ipsa lex*. Where there is no advance made or value given upon the faith of the documents, where the object is simply by a sweeping clause to gather in whatever may be got to recoup the creditor of a debtor who had become insolvent for an improvident advance made upon the faith of a totally different security, where upon the true construction of the assignment no interest passed that would place the assignee in a better position than the assignor, it appears to their lordships that such a transfer so made, and under such circumstances, cannot be held sufficient to defeat the vendor’s claim.” But the present case differs from that case, inasmuch as on the 14th of December, 1866, the bill of lading was in the hands of Lyall, Still & Co., and they indorsed and handed it over to the bank for the considerations to which allusion has already been made. It was handed over at that time for a valuable consideration.

Now it must be taken that the consideration for the deposit by the said firm of Lyall, Still & Co. with the defendants of

(1) 1 Sm. L. C., 699.

the said bill of lading was the release of the said firm from their original contract to supply shipping documents of China produce, the substitution of a new agreement, and the abandonment of the threatened legal proceedings. The defendants admit that on the 22d of December, 1866, the said firm of Lyall, Still & Co. did execute the writing or document set out in the 21st paragraph of the said bill, and that the said writing or document purports to be an assignment of the property therein mentioned to the defendants jointly with the Comptoir d'Escompte de Paris. They admit that the said assignment, and the facts relating thereto, were the subjects of a suit recently heard and decided. It is, in fact, the same agreement as that set up in *Rodger's Case* (1); but they say that the deposit of the said bill of lading for the said fifty trusses of long ells by the said firm of Lyall, Still & Co. with the defendants was a transaction anterior to and independent of the said assignment, and had no relation thereto or therewith. Their lordships are of opinion that the transfer of the bill of lading in *this case was for [515 a valuable consideration. It was transferred on the 14th of December, and had no relation to the document, which was executed on the 16th of December. This case differs entirely from *Rodger's Case* (1), because the bill of lading in that case was not handed over at the time, but was handed over in pursuance of the agreement generally, to hand over all bills. In this case it was handed over specially at the time in consideration of the release and of the abandonment of proceedings for not delivering over the shipping documents. It therefore appears that the bank did obtain a legal right to the goods by the indorsement of the bill of lading for a valuable consideration, and whether they afterwards actually received possession of the goods or not they had a legal title to them, without notice, and that legal title was not affected by the equity arising out of the circumstances under which the goods were sold by Messrs. Henderson & Co. to Lyall, Still & Co.

This case comes entirely within the case of *Henderson & Co. v. The Comptoir d'Escompte de Paris* (2), in which their lordships held that the bank got the legal title to the goods, and that that legal title was not affected by the equity arising from the terms upon which the goods were originally sold.

It was suggested that probably the bank gave back the bill of lading in consideration of Lyall, Still & Co.'s handing over to them the proceeds which they had received from the

(1) Law Rep., 2 P. C., 898.

(2) *Ante*, p. 253.

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purchasers; that Lyall, Still & Co. having got the proceeds which had been paid to them in anticipation, they handed over those proceeds, got the bill of lading back, and then handed over the goods to the purchasers. Even if Lyall, Still & Co. did sell the goods and receive the proceeds from the purchasers, and hand over the money to the bank, the bank would not be affected by the equity between Messrs. Lyall, Still & Co. and Messrs. Henderson & Co., as they had no notice of the terms upon which the goods were sold, and when Lyall, Still & Co. handed over to the bank the money which they had received as payment for the goods, the bank got a legal title to the money, and was not affected by any equity which might exist between Messrs. Henderson & Co. and Lyall, Still & Co. arising out of the agree-516] ment under which the goods were sold. *Therefore, under no circumstances were the bank liable or affected by the equity existing between Messrs. Henderson & Co. and Lyall, Still & Co., and they cannot be declared to be trustees for Messrs. Henderson & Co. of the proceeds of the goods.

Under these circumstances their lordships will advise Her Majesty that the suit cannot be maintained, that the decision of the learned judge ought to be reversed, and that the bill be dismissed with costs in the court below, and the costs of this appeal.

Solicitors for the appellants: *Linklater & Co.*

Solicitors for the respondents: *Travers Smith & Co.*

CASES

IN THE

PRIVY COUNCIL,

ON APPEAL FROM

THE EAST INDIES.

[Law Reports, 1 Indian Appeals, 364.]

J.C.(¹), June 12, 13; July 3, 1874.

***THE MADRAS RAILWAY COMPANY, Appellants; and [364
THE ZEMINDAR OF CARVATENAGARUM, Respondent.**

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.

Where it is the duty of the zemindar* to maintain the tanks on his zemindary, which are part of a national system of irrigation, recognized by the laws of India as essential to the welfare of the inhabitants, and the banks of a tank are washed away by an extraordinary flood without negligence on his part:

Held, that the zemindar is not liable for any damage that may be occasioned by the overflow of the water.

Fletcher v. Rylands (²) distinguished.

THIS was an appeal from a judgment and decree of the High Court of Madras, dated the 15th of February, 1871, affirming a *decree and judgment of C. G. Plumer, [365 Esq., Acting Judge of the Civil Court of Chittoor, in the presidency of Madras, dated the 26th of September, 1870.

The appellants, who were the plaintiffs in the suit, were the Madras Railway Company.

The respondent, who was the defendant, was Streemun Mahamundavaswamai Katauri Salvah Meakarajoo Voomthay Raja Maharajah Coomara Vencataperoomal Rajoo Bahadoor Thara Maharajooloo Gauroo, Zemindar of Carvatenagarum, in the district of North Arcot.

The suit was brought to recover the sum of Rs.45,000, as the aggregate alleged amount of damage said to have been sustained by the appellants, by reason of injuries done in

(¹) *Present*: The RIGHT HON. SIR JAMES W. COLVILLE, The RIGHT HON. SIR BARNES PEACOCK, The RIGHT HON. SIR ROBERT P. COLLIER, and The RIGHT HON. SIR LAWRENCE PEELE.

*A zemindar is a landlord upon whom tenants are dependent. M.

(²) Law Rep., 3 H. L., 330.

the years 1865 and 1866 to a portion of their railway, and to certain portions of the works connected therewith, and by reason of their losing a certain amount of traffic; the damage alleged was produced by the bursting and consequent escape of the water of two ancient tanks situate in the respondent's zemindary.

A portion of the appellants' line of railway, to a length of about thirty-one miles, runs through the zemindary of Carvatenagarum; and they alleged that on the 5th of December, 1865, a tank called the Puttoor Tank, situate on the west side of their line of railway, and in the respondent's zemindary, burst, and the water which escaped therefrom rushed with violence through the breach thereby made and against the embankment of the railway, and completely carried away a bridge, part of the line of railway, consisting of three fifteen-foot arches, together with twenty yards of the embankment. Also, that on the same 5th of December, 1865, another tank, called the Coyempetta Tank, in the zemindary of Carvatenagarum, burst, and the water which escaped therefrom flooded a large area of country to a considerable depth, and coming in contact with the line of railway, carried away two bridges, part of such line of railway, leaving breaches in the embankment of the railway forty-six yards and forty yards in length respectively. The water so escaping, by coming in contact with several culverts, part of the appellants' works connected with their railway, more or less injured the same. Further, that on the 10th of October, 1866, the Coyempetta Tank again burst, and the water 366] which *escaped therefrom rushed with such violence through a bridge, part of the railway, that the revetment of the abutment of the bridge was considerably injured. Moreover, that by reason of these breaches in the railway, public traffic over the same was more or less impeded, and the appellants had thereby sustained damage.

The respondent submitted (amongst other things) that "if the injuries complained of did take place, they were not the result of any influences subject to his control, but rather the consequences of '*vis major*,' or the act of God. The tanks referred to in the plaint have existed from time immemorial, and are requisite and absolutely necessary for the cultivation and enjoyment of the land, which cannot be otherwise irrigated, and the practice of storing water in such tanks in India, and particularly in this district and in the zemindary of Carvatenagarum and the adjacent districts, is lawful and is sanctioned by usage and custom. The said zemindary is a hilly district, and the ryots will be unable to carry on

their cultivation without such tanks, they being the chief source of irrigation, and the omission to store quantities of water in such tanks will be attended with consequences dreadful to the inhabitants of the country. The plaintiffs did not take proper care to prevent the occurrence of the thing complained of, and they must be held to have taken upon themselves the risk of damage happening. The respondent could not have avoided collecting a quantity of water in the tanks during the monsoon, and he has not failed to use any reasonable care that may be expected from him. There were also several tanks and channels above his tank belonging to government and other people which also burst at the same time. . . . All the three tanks above the Puttoor Tank were breached, and the channels could be traced by which the waters had flowed from one tank to another into the Puttoor Tank, and the same with regard to the tanks above Coyempetta, with one exception, while the highest tank was breached and in an unfinished or badly finished state."

It seems to have been clearly proved that for three or four days before the bursting of the tanks there had been heavy rains, and that for seventeen or eighteen hours before the accident there was a tremendous downpour of rain. Some of the witnesses said that *they had not known [367 such a fall of rain for twenty years; and one of the appellants' witnesses admitted that from the time the breaches occurred until the Sunday before his examination, i. e., for a period of nearly five years, he had never seen such a downpour. It seemed pretty clear that it was this continuous heavy downpour of rain that caused the tanks to burst.

The appellant alleged that if the tanks had had properly constructed calingulahs, or outlets for the overflow of water, they would not have burst.

The respondent, on the other hand, contended that the calingulahs used by him in these tanks were such as were used in tanks generally in that part of the country, and according to the usage and custom of the district; and that he had taken every reasonable and proper precaution to prevent the occurrence of ordinary accidents.

Mr. C. G. Plumer, the acting judge in the Civil Court of Chittoor, gave judgment for the respondent. In his judgment he said (*inter alia*):

"The defendant urges that plaintiffs constructed the railway long subsequent to the construction of the defendant's tanks, which have existed from time immemorial, and that,

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therefore, the plaintiffs took the land subject to the continuance of the existence of the tanks.

"It was clearly proved that the tanks in question have existed from time immemorial, and no doubt the plaintiffs were well aware of their existence. The plaintiffs, however, do not seek to interfere with the existence of the tanks, and, in my opinion, it cannot be held that the plaintiffs were bound to protect themselves against the bursting of the defendant's tanks. I do not think it necessary to refer to the several cases cited on the breach by defendant's counsel on this point, considering the nature of the High Court's judgment referred to above.

"The chief question to be decided is, did the defendant use every precaution to prevent the tanks on his estate from bursting and doing injury to his neighbor? Here it will be necessary to see what is the evidence in the case as to the cause of the tanks bursting.

"It is quite clear from the evidence of the third witness 368] for the *plaintiffs, that when the plaintiffs' three railway bridges were destroyed, the water from the Puttoor and Coyempetta Tanks had burst the natural boundaries of those tanks and overflowed down to the railway. It also appeared from the evidence of the third witness, and of the second witness (Mr. Scott), that above the Puttoor Tank, there are three tanks, and that above the Coyempetta Tank there are several tanks of various sizes.

"Mr. Scott and the fourth witness inspected all these tanks in February, 1866, the Coyempetta and Puttoor Tanks having burst in December, 1865, and they then found that all the three tanks above the Puttoor Tank were breached, and that they could trace the channels by which the waters had flowed from one tank to the other into the Puttoor Tank, and the same with regard to the tanks above Coyempetta, one of which, however, was not breached, while the highest tank was, the witness said, breached and in an unfinished or badly finished state.

"There is no evidence whatever to show whether the tanks above the Coyempetta and Puttoor Tanks were breached in December, 1865, or when they were breached; some of the larger tanks had regularly constructed calingulahs, while the smaller tanks had mud dams.

"The Puttoor and Coyempetta Tanks had each a calingulah.

"It was suggested, though it was not distinctly proved, that the cause of the breaching of the Puttoor and Coyempetta Tanks was an extraordinary flow of water from the

tanks above them, and this, it would appear from the tahsildar's reports I. and II., might have been the immediate cause of the disaster. The tahsildar, however, admitted that he had not seen those tanks at the time of the breaches, but he said that he saw the water coming from the direction of the tanks above Puttoor to the Puttoor Tank. .

"The plaintiffs urge that if all these tanks had had properly constructed calingulahs they would not have burst, and that the defendant, not having taken the precaution to construct such calingulahs, is responsible for his neglect.

"The defendant's case was that the defendant had taken every reasonable and proper precaution to prevent the occurrence of ordinary accidents, and that he was not liable for an extraordinary accident such as he alleges this to have been.

*"Now, in my opinion, the present case is distinguishable from the case of *Fletcher v. Rylands* ⁽¹⁾ so often referred to. [369

"The reservoir referred to in that case had been constructed for the defendant's own purposes, for his own benefit and advantage.

"In this case the defendant's tanks, which have been in existence for ages, exist not for the benefit of the defendant alone, but for the benefit of thousands of his ryots; 4,000 guntahs of land are irrigated by the waters stored in each of these tanks, and as one of the defendant's witnesses said, 'How could the people live if there were no waters in those tanks?'

"The existence of these tanks is absolutely necessary, not only for the beneficial enjoyment of the defendant's estate, but for the sustenance of thousands of his ryots.

"Looking, then, at the enormous benefit conferred on the public by these tanks; considering that, in this district at least, their existence is an absolute and positive necessity, for without them the land would be a wilderness and the country a desert. Considering these things, I think that it would be inequitable to impose upon the owners of the lands, on which these tanks are situated, a greater obligation than to use all ordinary precaution to prevent the water from escaping and doing injury to their neighbors.

"The cases of *Blyth v. Birmingham Waterworks Company* ⁽²⁾, and *Withers v. North Kent Railway Company* ⁽³⁾, appear to be on all fours with the present case; and in both of these cases, as the works were sufficient for ordinary

⁽¹⁾ Law Rep., 3 H. L., 330.

⁽²⁾ 25 L. J. (Ex.), 212.

⁽³⁾ 27 L. J. (Ex.), 417.

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occasions, the defendant was held not bound to provide against extraordinary accidents.

"I have now to determine whether the defendant did use reasonable and proper precautions to guard against all ordinary accidents. I am of opinion that he did ; it is not to be expected that you would find these tanks constructed on the most approved scientific principles, or furnished with the latest known works to provide for the escapement of the water. In not one of a hundred of the government tanks would you find calingulahs constructed on the best known principle. How then is it to be expected that defendant should make use of those appliances in the construction 370] *of his tanks. It was proved by the evidence of the defendant's ninth witness that the tanks of Puttoor and Co-yempetta, and those above them, had all either calingulahs or earthen dams, and that these calingulahs and earthen dams are in ordinary use throughout the whole district, and are considered perfectly sufficient for all ordinary occasions, and it appears to me that greater precaution could not properly be looked for from the defendant.

"'Negligence,' Baron Alderson said, 'consists in the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do, in either case unintentionally causing mischief to a third party.'

"Applying that definition to the present case, I am of opinion that the defendant did all that a reasonable man in his position and with his education and opportunities could have been expected to have done for the proper storing of the water in these tanks, and that he did not omit to take any reasonable precaution.

"And now to decide whether the bursting of the tanks was an ordinary or extraordinary accident.

"It is clearly proved that for three or four days before the bursting of the tanks there had been heavy rains, and that for seventeen or eighteen hours before the accident there was a tremendous downpour of rain, some of the witnesses said that they had not known such a fall of rain for twenty years, and the plaintiffs' third witness admitted that from the time the breaches occurred until the Sunday before his examination he had never seen such a downpour, i. e., for a period of nearly five years.

"I have no doubt whatever that it was this continuous heavy downpour of rain that caused the tanks to burst, and that the accident was an extraordinary one, against which the defendant was not bound to provide.

“And here I would refer again to the two cases previously cited by me. In *Blyth v. Birmingham Waterworks Company* ⁽¹⁾ the apparatus for supplying the street with water, constructed according to the best known principles, was so acted upon by a frost of unusual severity as to cause it to become inoperative, the defendants were held not liable for the damage occasioned by the pipe bursting.

*“And in *Withers v. North Kent Railway Company* [371] ⁽²⁾, where a portion of the line of railway was injured by an extraordinary flood, the state of the road being secure against ordinary flood, the company was held not liable for injury to a passenger by displacement of the rails.

“These cases appear to me to be very similar to the present case, here the means of escapement allowed in the tanks were sufficient for all ordinary floods; they were such as are universally employed throughout the country, but they broke down under the pressure occasioned by the extraordinary floods induced by an extraordinarily heavy fall of rain.

“I find, then, that the defendant was bound only to use all reasonable care and precaution to prevent the occurrence of ordinary accidents arising from the bursting of the tanks.

“That he did use such reasonable care and precaution with respect to the tanks referred to in the plaint; that the bursting of the tanks in December, 1865, was an extraordinary accident against which defendant was not bound to provide; and that he is not liable to plaintiffs for the damage sustained by them in consequence of the bursting of the said tanks.”

On appeal, the High Court of Madras upheld the judgment of the court below in favor of the respondent. In his judgment the Hon. William Holloway, acting Chief Justice, said:

“It was not attempted to impeach the conclusions of the Civil Judge upon the evidence, and the question of negligence of construction does not really arise. These conclusions are: 1. That the tanks were existent beyond living memory. 2. That they were breached by an extraordinary flood. 3. That they were tanks constructed in the ordinary manner, with escapements sufficient for all ordinary floods, and are such as are universally employed. 4. That these tanks are absolutely necessary to human existence as far as it depends upon agriculture. 5. And, if there is anything in the point, that the railway was constructed with a full

⁽¹⁾ 25 L. J. (Ex.), 212.

⁽²⁾ 27 L. J. (Ex.), 417.

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knowledge of their existence. If it had been a case of nuisance there would have been a coming to the nuisance. If the court on the first hearing of the case had intended to 372] apply the doctrine of **Fletcher v. Rylands* (') nothing would have remained but to assess the damages, and this was manifestly not the intention. Coming to the case, therefore, for the first time, I feel at full liberty to consider and decide upon the whole matter involved.

"A rule of English law is not a rule for us unless it is a correct rule, and it is quite possible that a rule excellent there may be wholly inapplicable here. It is impossible not to agree with Baron Bramwell that it is important to ascertain the principle on which a case should be decided, and in every case in which it is a question of a right, the nature of that right and its grounds of origin demand careful scrutiny. When a law, made up, by cases, determines that there is in a particular case a liability, it in fact decides that there has been an infraction of right. When the House of Lords and the Exchequer Chamber in that case decided that there was a liability to compensate, they, in fact, decided that a man has a right to store water only when he has taken complete precautions against its escape, that the escape is irrebuttable evidence of the culpable hurting of the right of another, of the commission of an injury, and that he is bound to compensate for the damage caused. The rights of demand which we are here discussing are in English law called torts, and by modern writers on Roman law they are commonly termed obligations arising from unpermitted acts. It has been objected to this classification that all independent rights of demand are to be included in this group which have for their object the preserving unimpaired the jural condition of a person, and restoring it where it has been injured without legal ground, and indifferently, in the first place, whether the hurtful act was an unpermitted one or not (*Förster, Preus Priv. R.*, 523). The point to which the attention of this eminent practical lawyer is here directed, is the fact that an act, apparently innocent and not therefore unpermitted, becomes the basis of the claim when damage actually results. The English case is an example of this. The truth, however, is that the act is decided to be an unpermitted one when it creates the damage, and this, not because damage without injury is or can be a cause of action, but because the right of the neighbor is not a right to prevent the building of a reservoir, but a right to prevent his 373] *mine from being invaded by water artificially collected.

(') Law Rep., 3 H. L., 330.

The right is not one to collect any water at his pleasure, but only such as he can restrain within his own bounds. When he fails to restrain it (this being the compass of his right) he exceeds that right, infringes the right of his neighbor, and commits an injury. In that case of *Fletcher v. Rylands*, the Lord Chancellor says (¹):

“My Lords, the principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of land, be used; and if in what I may term the natural user of that land there had been any accumulation of water, either on the surface or underground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving or by interposing some barrier between his close and the close of the defendants, in order to have prevented that operation of the laws of nature.”

“The test here proposed is whether the accumulation took place in the course of the natural user of the close. Now it is very obvious that the most natural user of land is for the purposes of agriculture, and that in England, until the summer of 1868, it never entered into the head of any Englishmen that the storing up of large quantities of water could be essential to agriculture. How does the case stand here? Such storing is absolutely essential to the simple agriculture of the people. This cannot be put more forcibly or more truly than it has been put by the Civil Judge. Laws older than the Mahomedan domination, as old as authentic history, have recognized the primary necessity of such tanks, and declared the destruction of them the greatest of crimes; and for the obvious reason that they are the well spring of a people's life—surely the storing up of water is no mere artificial user of Indian land but the only possible mode of natural user. *Looking therefore at the prin- [374] ciple of this case, and not merely at its form, I am clearly of opinion that there is no right to compensation simply because of damage from an escape. The rule upon which the relative rights of men are to be determined is no mere unbending formula. The existence of men in society requires

(¹) Law Rep., 3 H. L., 338.

that each should sacrifice a portion of his abstract rights to permit of the coexistence of others. This has of course been constantly recognized. In this as in so many other cases the formal rule of law is to be drawn from the matter of which it is the regulating principle. In *Tipping v. St. Helen's Smelting Company* ⁽¹⁾ the necessities of commerce are admitted as a ground for compelling persons in a populous town to put up with poisonous vapors, although the superior sanctity of property, always in England better considered than life or limb, is duly asserted at page 651. In *Cavey v. Ledbitter* ⁽²⁾ the Chief Justice points out the influence of time, place and circumstance upon the question of nuisance. In *Bamford v. Turnley* ⁽³⁾ all the judges recognize the doctrine. At the close of the judgment in the Exchequer Chamber in *Fletcher v. Rylands* ⁽⁴⁾ the necessities of traffic upon the highway of trade and commerce are recognized as grounds for the more limited duty imposed upon carriers and people throwing down packages from wharves.

"Whether *volenti non fit injuria* can be regarded as an explanation of the diversity where people are not fed by ravens, and where it is scarcely a matter of choice with a London clerk or laborer whether he will go into the St. Katharine's Docks or not, is another question. The true reason of the rule is that although not an immediate national economy, wealth and prosperity, with all other objects of man's ethical interest, are mediate sources of law. This has had, always will have, and always ought to have, an important influence upon the construction of legal propositions. In the present case, I say agriculture is the oldest of arts. It is still the one of the greatest primary importance. Human life cannot subsist without it, and, despite the Lord Chancellor, human life is more important than property. 375] This art in the country from *which this case comes is impossible without tanks by which water is to be stored to meet the terrible drought, which in their absence would wither every blade of grass, destroy the cattle, and render future culture impossible. This paramount human interest requires that a certain amount of risk should be incurred by those who, for the purposes of gain or otherwise, resort to a country of which this is the normal condition. They must put up with the inconveniences. They have a perfect right to require that they shall not be injured by the negligence of other people, but they have no right to be secured

⁽¹⁾ Law Rep., 1 Ch., 66; 11 H. L. C., 642.

⁽²⁾ 3 B. & S., 66.

⁽³⁾ Law Rep., 1 Ex., 265.

⁽⁴⁾ 13 C. B. (N. S.), 476.

at all events against consequences resulting from the natural user of the land and the changeable character of the climate. To impose such a duty upon a landlord here, because it has been imposed elsewhere upon men who store up matter which may be dangerous and is not necessary, is to disregard the very principle upon which that duty was imposed. These observations are sufficient for the disposal of the only question put in issue against the appellants, and I only remark upon the question of negligence because the Civil Judge has done so. My remarks shall be very few.

“As to the sufficiency of the precautions to be used he will not find the English cases so clear as he seems to have imagined. In *Withers v. North Kent Railway Company* (¹) there was a decision to the effect stated. The regular reporter, however, has judiciously omitted it, and because he, as well as the Privy Council (²), was unable to reconcile it with one which was decided within three weeks (*Ruck v. Williams* (³)). The doctrine of normal and abnormal is pushed to an extraordinary length in that case, and the only inference which it seems possible to draw is, that Commissioners of Sewers are bound to greater foresight than railway companies. The doctrine of the Privy Council case again, not by any means going to the length of the case in the Exchequer, was disapproved of in *Czech v. General Steam Navigation Company* (⁴), where Willes, J., declares that the throwing the burden of proof on the railway company simply on account of the accident was wrong in the opinion of Erle, C.J. It cannot be said, therefore, that the English doctrine is in a very settled state. It *certainly seems that if a [376 passenger injured by a railway company is required to prove that there was negligence, that company being carriers for hire, the rule cannot reasonably be otherwise where, without any contractual relation, a man is to be made liable for *culpa* in the non-performance of the duty ‘of exercising in his habitual conduct a certain foresight and circumspection of especially abstaining from operating hurtfully upon the property of others. He who acts in contrariety to this civic duty without any definite design whatever is found in *culpa*.’ Holtzendorff, Encyclopädie ii., p. 242. If therefore the question of negligence had been an issue, I should consider it not proved. The finding of the Civil Judge on this point was not contested at the bar. For the same reason I do not think it necessary to consider what construction ought to be put upon the passage at the close of the Lord Chancellor’s

(¹) 27 L. J. (Ex.), 417.

(²) 1 Moore, P. C. (N.S.), 101.

(³) 3 H. & N., 308.

(⁴) Law Rep., 3 C. P., 14-16.

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judgment in *Tipping v. St. Helen's Smelting Company* ⁽¹⁾ with respect to prescription, or to consider what influence the antiquity of the tanks ought to have upon this question.

"My conclusions are, that on the true understanding of the case of *Fletcher v. Rylands* ⁽²⁾, the Civil Judge's decree is right; that if otherwise the imposing of such a duty upon a landowner is forbidden by precisely the same principles as have forbidden the imposition upon wharfingers, railway companies, and shipowners. That this attempt would never have been made if the final decision had rested with judges conversant with the necessities of the country, and that it has only been made in the hope that such a rule may be imposed elsewhere by judges not so conversant. It is my hope and belief that that attempt will not be successful; if it is I can imagine nothing more calamitous to the Hindu than what is called opening up the resources of the country. Either he must throw his land out of cultivation, or, without proof of any negligence on his side, be compelled to compensate for damages resulting from natural cultivation, to works centuries in advance of his immediate social necessities, and expensive beyond any which these actual necessities would have generated.

"I entertain neither doubt nor hesitation in dismissing this appeal with costs."

And Mr. Justice Innes said: "If a man causes injury to 377] another, *and damage follows, he is answerable for the act from which the injury has arisen if he could have avoided it. About the damage in this case there is no question; then was there injury? Was there, by any avoidable act or omission of defendant, a breach of an obligation due to plaintiff. What is the obligation of defendant as to keeping these tanks from bursting and causing mischief? The tanks are ancient. They are maintained as they have been immemorially used for the purposes of irrigation, according to a system in use throughout this part of India. The state is the general landlord, but in some parts of the country it has made over certain of its rights as landlord to zemindars like the defendant, who thus became vested with the duties of management which previously appertained to the state. One of the duties which the state has always recognized as appertaining to itself is the maintenance of old and the extension, wherever practicable, of new works of irrigation. The reason is obvious. Where works of irrigation are in existence, a population gradually gathers in the neighborhood, and land is taken up and brought under cultivation

⁽¹⁾ 11 H. L. C., 642.

⁽²⁾ Law Rep., 3 H. L., 330.

on the faith of the works being maintained. Water brings with it abundance in good seasons, and enables provision to be made against seasons of scarcity. If the maintenance of these works is abandoned, the population dwindles with the diminution of the means of subsistence, becomes impoverished, and finally disappears. The state also suffers in the loss of revenue which follows the diminution of abundance. When, therefore, irrigation works have been constituted and maintained, and proved conducive to the increase of population and wealth, it seems obvious that their maintenance ought to be continued, and that the state, in recognizing its duty to maintain them, has acted upon the view that their maintenance is necessary to the prosperity and advancement of the country. The tanks of this defendant are in the same position in this respect as the other works under the direct management of the state. Now, it appears to me that in this country, that which the state has, in the interests of the community, taken upon it to maintain, it has impressed with the character of lawfulness, and although the maintenance of it may be, in some particular circumstances, dangerous to the interests of private persons, it is by the character which the state, acting for the community, has impressed upon it, removed from the class of dangerous and [378] noxious things which a man brings and keeps at his peril, 'whether' (as expressed by Blackburn, J., in *Fletcher v. Rylands* (')) 'the things so brought be beasts or water, or filth or stench,' and is properly placed on a footing with the class of dangerous trades and occupations in England, for which there is legislative sanction. In such cases, what is authorized to be done must be done in a careful manner. This is the whole obligation; in other words, negligence causing damage gives a cause of action; but unless there be negligence there is no action for damage caused by acts within the scope of the express or necessarily implied authority conferred by the law. See *Jones v. Festiniog Railway* ('), in which *Vaughan v. Taff Vale Railway Company* ('') is quoted, and the recent case of *Smith v. London and South Western Railway Company* ('') (decided in the Exchequer Chamber).

"Now, it is conceded that in this case the defendant had so maintained the tanks up to the date of the damage occurring that for twenty years they had not burst; and the evidence shows that but for the extraordinary rainfall there was no reason for apprehension. They were of the ordinary con-

(1) Law Rep., 1 Ex., 280.

(2) 37 L. J. (Q.B.), 214.

(3) 29 L. J. (Ex.), 247; 5 H. & N., 679.

(4) 40 L. J. (C.P.), 21.

struction of most of the government tanks; but it is conceded that some tanks have stone weirs, which offer greater security for the gradual escape of an unusual influx of water than those of these tanks. But I agree with the judge that defendant was not bound to avail himself of the last results of science, and that there was no want on his part of proper care and precaution.

"For the reasons just given I think that the nature of these tanks, as shown in the defence, is such as to exempt defendant from responsibility for damage caused in the maintenance of them, unless there has been negligence on his part giving occasion to the damage. There has clearly been no negligence, and I agree in dismissing this appeal with costs."

Sir *John Karlake*, Q.C., Mr. *Watkin Williams*, Q.C., and Mr. *Mansel Jones*, for the appellants: The principle applied [379] cable to cases like this is accurately laid down in *Fletcher v. Rylands* (*). Lord Cranworth there said: "If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage."

So also Lord Cairns said (*): "If the defendants, not stopping at the natural use of their close, had desired to use it for any purpose, which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land; and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing, they were doing at their own peril."

See also *Filliter v. Phippard* (*); *Tubervil v. Stamp* (*); *Jones v. Festiniog Railway Company* (*); *Vaughan v. Taff Railway Company* (*); *Ruck v. Williams* (*). Here the use of the land was not a natural use. It cannot be said to be a natural use to store up water in quantities so large that it may escape and damage your neighbors. When you are building a water-tank, it is not sufficient to make it large enough to contain the amount of water that falls ordinarily.

(1) Law Rep., 3 H. L., 840.

(2) Ibid., 339.

(3) 11 Q. B., 347.

(4) 1 Salk., 18.

(5) Law Rep., 3 Q. B., 733.

(6) 29 L. J. (Ex.), 247; 5 H. & N., 679.

(7) 27 L. J. (Ex.), 357; 3 H. & N., 308.

It is proper to expect extraordinary falls of rain and to make provision therefor. There is ordinary "extraordinary" weather against which to provide. If a man keeps a lion in a cage, and the cage is struck by lightning, and the lion let loose, is he to say it was the act of God? The damage is done because he keeps a dangerous thing which is liable to be let loose. If a man has a fire in his house, and the fire extends to his neighbor's house, he will be liable, even though there were no negligence on his part. It cannot make any difference as to the damage here, that the tanks are of great use to the landowner and his *tenants. [380 With regard to the argument of coming to a nuisance, it is not a question of nuisance at all. We could not restrain them by injunction; all we could say would be, if you place or keep this artificial structure on the land, so as to be dangerous to your neighbors, then you must be responsible for damages: *Tipping v. St. Helen's Smelting Company* (*). If the reservoir exists for any number of years, the zemindar does not acquire a prescriptive right to allow water to escape. With regard to negligence, the courts below have wholly misinterpreted the law as to it.

Mr. *Leith*, Q.C., and Mr. *S. G. Grady*, for the respondent: Our arguments are: First, the general law of England is not applicable here. Secondly, if it were, the case of *Fletcher v. Rylands* (*) is not applicable. And, thirdly, if it were, then this case comes within the exceptions that are alluded to in *Fletcher v. Rylands* (*). The facts in *Fletcher v. Rylands* are wholly different from the facts here; for there a man had brought on the land something for his own purposes. He was under no obligation to maintain it there; he could have removed it whenever he liked. Here the reservoir was an integral portion of the land as the respondent received it. There was no voluntary act on his part in placing it there. It would have been a crime on his part to remove it. He took all reasonable and proper precautions to prevent the tanks from bursting. But the escape of the water was the result of unavoidable circumstances, over which he had no control. The appellants in their plaint did not charge the respondent with negligence. [They referred also to *Mayor of Lyons v. East India Company* (*).]

July 3. Their lordships having reserved their judgment, it was now delivered by

THE RIGHT HON. SIR ROBERT P. COLLIER: The Madras Railway Company claimed in this suit damages against the

(*) Law Rep., 1 Ch., 66; 11 H. L. C., 642.

(*) Law Rep., 3 H. L., 330.

(*) 1 Moore, P. C., 175.

381] defendant, the zemindar of Carvatenagarum, for *injuries occasioned to their railway and works by the bursting of two tanks upon his land.

The defendant denied that the injuries complained of resulted from the bursting of the tanks; he asserted that if they did so arise, the bursting was caused by no act or negligence of his, but by *vis major*, or the act of God. He further pleaded in these terms:

"The tanks referred to in the plaint have existed from time immemorial, and are requisite and absolutely necessary for the cultivation and enjoyment of the land, which cannot be otherwise irrigated; and the practice of storing water in such tanks in India, and particularly in this district and in the zemindary of Carvatenagaram and the adjacent districts, is lawful, and is sanctioned by usage and custom. The said zemindary is a hilly district, and the ryots will be unable to carry on their cultivation without such tanks, they being the chief source of irrigation, and the omission to store quantities of water in such tanks will be attended with consequences dreadful to the inhabitants of the country.

"The defendant could not have avoided collecting a quantity of water in the tanks during the monsoon, and he has not failed to use any reasonable care that may be expected from him. There were also several tanks and channels above his tank belonging to government and other people, which also burst at the same time."

He also contended that the damage arose through want of proper care on the part of the appellants in the construction of their works, but this contention was abandoned. It was found by both courts, and it is not now disputed, that the works of the plaintiffs did suffer serious damage from the bursting of the tanks; these last two questions, therefore, need not be further referred to.

The issues, as far as they are material to this appeal, agreed to by the parties, were:

1. Whether the injuries complained of were the result of *vis major*, or the act of God, or other influences beyond the defendant's control.

2. Whether defendant is liable for any, and if so what, damages sustained by the plaintiffs.

The evidence given in the cause may be summarized as 382] *follows: It was shown that the tanks of the defendant, which were ancient tanks, the date of their origin not appearing, were constructed in the usual manner, that the banks were properly attended to and kept in repair, that

sluices and outlets for the water were provided of the kind usually employed both in private and government tanks, and usually found sufficient, and which had proved sufficient to prevent any overflow or bursting of the tanks in question for twenty years; but that an improved description of sluice, of recent introduction, would be still more efficacious. That at or some days before the accident there had been an unusual and almost unprecedented fall of rain, described by the deputy-inspector of the railway as the heaviest he had ever seen during his residence of thirteen years in the locality, and by witnesses for the defendant as exceeding any fall of rain for twenty years; that this extraordinary flood, which caused the neighboring river to overflow, and possibly brought down to the tanks, whose overflowing is complained of, the contents of other tanks at higher levels, proved more than the sluices could carry off, that the banks of the tanks were overflowed, and finally carried away.

Upon these facts the acting Civil Judge of the Civil Court of Chittoor found for the defendant, holding that he was not liable in the absence of negligence, and that he had not been negligent. This judgment was affirmed by the High Court on appeal.

The appellant now contends that the judgment of the High Court should be reversed on two grounds:

1st. That the defendant, by storing up water on his land, rendered himself liable in damages, should it escape and do injury to other persons, even though he might not have been guilty of negligence.

2d. That both the Indian courts have applied an erroneous rule of law to the consideration of the question of negligence.

The case mainly relied upon in support of the first contention is *Fletcher v. Rylands* ⁽¹⁾, which it becomes necessary to examine. In that case the plaintiffs, the owners of a mine, sued for damages the defendants, owners of some adjacent land, who had constructed a reservoir on their land for the purpose of working a mill, from which reservoir water flowed through some disused mining works *into [383 the plaintiff's mine, and flooded it. It was held by the Exchequer Chamber and by the House of Lords that the plaintiffs were entitled to damages against the defendants. The grounds of this judgment are stated very clearly and shortly by the then Lord Chancellor (Lord Cairns), and Lord Cranworth. The Lord Chancellor says:

⁽¹⁾ Law Rep., 8 H. L., 330.

“The principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners and occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of the land, be used; and if, in what I may term the natural use of that land, there had been any accumulation of water, either on the surface or underground; and if, by the operation of the laws of nature, that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so, by leaving or by interposing some barrier between his close and the close of the defendants, in order to have prevented that operation of the laws of nature. . . . On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which, in its natural condition, was not in or upon it, for the purpose of introducing water either above or below ground in quantities, and in a manner not the result of any work or operation on or under the land; and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing, they were doing at their own peril; and if, in the course of their doing it, the evil arose . . . of the escape of the water and its passing away to the close of the plaintiff, and injuring the plaintiff, then, for the consequence of that, in my opinion, the defendants would be liable.”

Lord Cranworth thus states the principle of the decision: “If a person brings and accumulates on his land anything 384] *which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage . . . and the doctrine is founded in good sense. For when one person in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non laedat alienum*.”

But the principle that a man, in exercising a right which belongs to him, may be liable, without negligence, for injury

done to another person, has been held inapplicable to rights conferred by statute. This distinction was acted upon in *Vaughan v. Taff Vale Railway Company* (*), where it was held by the Exchequer Chamber that a railway company were not responsible for damage from fire kindled by sparks from their locomotive engine, in the absence of negligence, because they were authorized to use locomotive engines by statute. Chief Justice Cockburn observes, "where the legislature has sanctioned and authorized the use of a particular thing, and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence, that if damages result from the use of such a thing independently of negligence, the person using it is not responsible." This view is fortified by the consideration that the legislature may be presumed not to have conferred special powers on persons or companies without being satisfied that the exercise of them would be for the benefit of the public, as well as of the grantees. On the same principle it was decided that a waterworks company laying down pipes by a statutory power, were not liable for damages occasioned by water escaping in consequence of a fire-plug being forced out of its place by a frost of unusual severity: *Blyth v. Birmingham Waterworks Company* (*).

On the other hand, in *Jones v. Festiniog Railway Company* (*), it was held that a railway company which had not express statutable power to use locomotive engines, was liable for damage done *by fire proceeding from [385 them, though negligence on the part of the company was negatived.

It has been argued on the part of the respondent that the case of *Fletcher v. Rylands* (*), decided on the relations subsisting between adjoining landowners in this country, has no application whatever to India. Though that case would not be binding as an authority upon a court in India not administering English law, their lordships are far from holding that, decided as it was, on the application of the maxim, *sic utere tuo ut alienum non lædas*, expressing a principle recognized by the laws of all civilized countries, it does not afford a rule applicable to circumstances of the same character in India—they are of opinion, however, that the circumstances of the present case are essentially distinguishable.

(*) 5 H. & N., 679.

(*) 25 L. J. (Ex.), 212.

(*) Law Rep., 3 Q. B., 733.

(*) Law Rep., 3 H. L., 330.

The tanks are ancient, and formed part of what may be termed a national system of irrigation, recognized by Hindu and Mahomedan law, by regulations of the East India Company, and by experience older than history, as essential to the welfare, and, indeed, to the existence of a large portion of the population of India. The public duty of maintaining existing tanks, and of constructing new ones in many places, was originally undertaken by the government of India, and upon the settlement of the country has, in many instances, devolved on zemindars, of whom the defendant is one. The zemindars have no power to do away with these tanks, in the maintenance of which large numbers of people are interested, but are charged under Indian law, by reason of their tenure, with the duty of preserving and repairing them. From this statement of facts referred to in the judgment of the High Court, and vouched by history and common knowledge, it becomes apparent that the defendant in this case is in a very different position from the defendants in *Fletcher v. Rylands* ⁽¹⁾.

In that case the defendants, for their own purposes, brought upon their land and there accumulated a large quantity of water by what is termed by Lord Cairns "a non-natural use" of their land. They were under no obligation, public or private, to make or to maintain the reservoir; no rights in it had been acquired by other persons, and they could have removed it if they had thought fit. The rights [386] and liabilities of the defendant appear to their lordships much more analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed. The duty of the defendant to maintain the tanks appears to their lordships a duty of very much the same description as that of the railway company to maintain their railway; and they are of opinion that, if the banks of his tank are washed away by an extraordinary flood without negligence on his part, he is no more liable for damage occasioned thereby than they would be for damage to a passenger on their line, or to the lands of an adjoining proprietor occasioned by the banks of the railway being washed away under similar circumstances. See *Withers v. North Kent Railway Company* ⁽²⁾.

The second ground on which the appellant relied was not so clearly stated; their lordships understood it to be, in substance, that the court below and the High Court estimated by a wrong standard the amount of care which the law requires of the defendant.

⁽¹⁾ Law Rep., 3 H. L., 830.

⁽²⁾ 27 L. J. (Ex.), 417.

It should be observed that the question of negligence was little, if at all, argued in the High Court. The judge of the court below quotes and applies to the case the following definition of negligence by Baron Alderson: "Negligence consists in the omitting to do something that a reasonable man would do, or in the doing something that a reasonable man would not do, in either case unintentionally causing mischief to a third party;" and the High Court confirm this view of the law. Without adopting every expression of the judge of the inferior court, their lordships are unable to say that the case has been decided on an erroneous view of the law. On the question of fact whether or not negligence was proved by the evidence, they see no sufficient reason for departing from their ordinary rule of not disturbing the concurrent finding of two courts.

For these reasons their lordships will humbly advise Her Majesty that the judgment of the court below should be affirmed, and the appeal dismissed with costs.

Solicitors for the appellants: *Freshfields*.

Solicitors for the respondent: *Keen & Rogers*.

[Law Reports, 1 Indian Appeals, 387.]

J.C.(¹), June 18, 19, 20; July 24, 1874.

***GANENDRO MOHUN TAGORE, Appellant: and RAJAH [387 JUTTENDRO MOHUN TAGORE, OPENDRO MOHUN TAGORE, DOORGA PERSAUD MOOKERJEE, BROOJENDRO BHOOSUN CHATTERJEE, and CHUNDER MOHUN CHATTERJEE (Trustees), Respondents.**

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM, IN BENGAL.

Where a devise is to determine on the devisee ceasing to use a certain house as his residence, and no manner or period of residence is prescribed, exclusive residence is not supposed to be meant; the occasional use of the house and keeping an establishment in it with the intention of again using it as a residence is a sufficient compliance with the condition.

Question raised as to what is a sufficient compliance with the condition of using a Boitokanah house as a residence.

The condition as to cesser does not arise in consequence of the devisee not using the house in any sense as his residence for four years after the testator's death, where the delay can be justified by the pendency of a suit brought to defeat his title, and by his inability to obtain possession of the whole of the house from trustees, and by the unfit state of the house for residence owing to the want of repairs, which were in progress.

(¹) *Present*: The RIGHT HON. SIR JAMES W. COLVILLE, The RIGHT HON. SIR BARNES PEACOCK, The RIGHT HON. SIR MONTAGUE E. SMITH, and The RIGHT HON. SIR ROBERT P. COLLIER.

THIS was an appeal from the judgment and decree of the High Court of Judicature at Fort William, in Bengal, dated the 19th of May, 1873, on a hearing before the Hon. Mr. Justice Macpherson and the Hon. Mr. Justice Pontifex, whereby it was ordered and decreed that the appellant's suit should be dismissed with costs. The object of the suit was to have it declared that the interest of the respondent, Juttendro Mohun Tagore, in the property of the late Hon. Prosono Coomar Tagore ceased on the 15th of January, 1869, and to obtain possession of the property for the appellant.

The facts of the case are sufficiently set forth in the judgment. The chief question for the consideration of the 388] Judicial Committee *was as to whether the provisions of the will of the Hon. Prosono Coomar Tagore (which had formed the subject of a former appeal to Her Majesty in Council) had been complied with as to the respondent Juttendro using the Boitokanah house as his residence. The testator had provided that if the devisee should cease "to use, as his residence in Calcutta, the Boitokanah house and premises, then the devise should cease and determine." The appellant contended that the respondent Juttendro had ceased to use the house as his residence. Juttendro, on the other hand, contended that he had been, and now was, using it as his residence.

Another of the questions was as to whether there had not been a breach of the condition as to residence, in consequence of the respondent not having used the Boitokanah house in any sense as a residence between the 28th of August, 1868, when the testator died, and the completion of some large repairs in October, 1872. The respondent contended that this delay was justified by the pendency of a suit brought by the appellant to defeat the respondent's title altogether; by his inability to get possession of the entire house from the trustees; and by the unfit state of the house for residence owing to the want of repairs.

Mr. *Joshua Williams*, Q.C., and Mr. *Leith*, Q.C., (with them Mr. *J. D. Bell*, Mr. *Forbes*, and Mr. *Lawrence Bialé*), for the appellant: In the court below it was urged that, inasmuch as the limitations to take effect on the determination of Juttendro's interest had been declared to be void, the condition as to cesser also fell to the ground, and the heir could take no advantage of a breach of it. But the interest of the devisee is to cease on the cessation of residence, irrespectively of these limitations.

Then it was said that until Juttendro became entitled to

a conveyance from the trustees on the death of the last annuitant, the condition as to cesser would not attach; that this was shown by the fact that one of the causes of forfeiture was non-payment of the government jumma; that this being very much more than the Rs.30,000 a year to which only Juttendro would be entitled before there was a surplus income, the testator could not have meant that there should be a forfeiture in default of the *respondent paying a [389 very much larger sum than he was getting at the time. However, we contend that it is clear that the testator in this clause contemplated an immediate residence by the respondent. Juttendro comes within the meaning of the clause, as he is a tenant for life, subject to the charge for the payment of legacies and annuities. It would clearly be defeating the object of the testator, if he might hold the house and be in the enjoyment of the rents and profits of the estate, and yet delay his residence until the last annuitant had died. What was intended was to have continuously a representative of the family at the Boitokanah house.

Thus the case is limited to the question whether or not Juttendro has used the Boitokanah house as his residence in Calcutta. He clearly has not done so. The testator did not give a mere general direction to reside there, but a particular direction to reside and to make use of the library, horses, carriages and jewels. Juttendro's user of the house has been a mere colorable one.

He has slept and taken his meals always at his family house, and not at the Boitokanah; he has not given any of his entertainments at the Boitokanah. In order to reside there, it is not sufficient for him to keep his servants there, and to go there occasionally by day and transact his business there, and sometimes receive his visitors there. His intention of not residing there is, moreover, shown by his removal from the Boitokanah to his private house of much of the furniture and the jewels; also of the plate, &c., and things connected with the state and dignity of the testator.

With regard to what constitutes residence, see *Dunne v. Dunne* (1); *Walcot v. Botfield* (2); *Rex v. Sargent* (3); *Wynne v. Fletcher* (4).

In considering the effect of the clause upon the will, reference was also made to *Sheppard's Touchstone*, p. 157.

Mr. *Forsyth*, Q.C., and Mr. *Doyne*, (with them Mr. *Cowie*, Q.C.), for the respondents: The limitations that were to take effect on the determination of *Juttendro's in- [390

(1) 7 De G. M. & G., 207.

(2) Kay, 534.

(3) 5 Durn. & East, 466.

(4) 24 Beav. 430.

terest have been declared to be void ; consequently the condition as to cesser of the estate in the event of non-residence does not come into effect. At any rate the heir cannot take advantage of it. The words of the will expressly are, "the person next in succession to" the tenant for life "under the limitations aforesaid shall at once succeed." See *Seymour v. Byrne* ⁽¹⁾.

However, we contend that there has been, in fact, no breach of the condition. From the death of the testator on the 28th of August, 1868, to the completion of the repairs in October, 1872, the respondent, it is true, did not use Boitokanah as his residence, but he visited the house and transacted the business of the estate there as one of the trustees, and durwans paid by the trustees were kept in it. The reasons for his not commencing his residence there during this interval are three. First, his title was not admitted ; the suit was pending in which the appellant sought to oust him altogether from the estate ; it was begun in August, 1868, and not finished until July, 1872. How could he be expected to incur the expense of making that his residence when he might, after all, have been liable to be ejected ? Secondly, he was unable to get possession of the entire house from the trustees ; he only succeeded in doing so by a suit, which was begun in May, 1870, and finished in March, 1872. He was not bound to take violent possession. And, thirdly, the Boitokanah was wholly unfit for a residence until the completion of the necessary repairs. How could he reside in a house with cracked walls ? Accordingly, in November, 1872, when this suit was commenced, there was no ground for saying that the condition for cesser was not complied with.

It is quite clear the testator could not have contemplated the clause with reference to cessee coming into operation immediately on his death. For one of the causes of cesser was non-payment of the government revenue, and this was far more than the income which Juttendro at first derived from the estate. According to the contention of the appellant, Juttendro would have found himself in this position : he, a tenant for life, would be obliged to pay a much larger sum to the government than he was getting for the estate, and yet 391] would be obliged to keep his *residence at the Boitokanah house. The intention of the testator was that the clause for cesser was to come into operation after the trusts were at an end and the donee's estate perfected by a conveyance.

(1) 38 L. J. (Eq.), 890.

The respondent lost no time in having the Boitokanah house repaired, and since October, 1872, he has used it as his residence in the strictest sense. "Residence" is, no doubt, a vague expression. If a man keeps an establishment at a house in England he is said to reside there, even though he may not go there for years. With respect to a Hindu residence, we must, of course take into consideration the customs of Hindus. We must take into consideration the ordinary use of a Boitokanah house. The testator never intended that it should be used as an ordinary dwelling-house. And even if he had, enough has been done by the respondent to enable him to say he resides there. It was sufficient for him to keep his servants and his establishment there, to go there occasionally, to transact his business there, to receive his visitors there. It was not necessary for him to sleep there, or to give his entertainments there. As regards the ladies, all the evidence shows that they could not reside there unless extensive alterations and additions were made, which would entirely change the character of the house, and make it unsuitable for the purpose of a Boitokanah. The Boitokanah is not built in such a manner as to allow a Hindu gentleman like Juttendro—who, as the testator knew, was a married man living with his family—to use it as a family residence; and the testator himself never used it in this way.

With regard to the furniture, &c., Juttendro merely removed some of the furniture and pictures from the Boitokanah temporarily for safe custody during the repairs. On the completion of the repairs they were restored, with the exception of a portion of the furniture, which was old and broken, and was consequently replaced. He has also sometimes allowed a few pictures to be removed for the purpose of being copied by his friends. And as to the jewelry and plate, he selected for his own use and retained the best, and enjoyed it according to the will of the testator, and permitted the executors to sell the remaining portion thereof.

On the question of forfeiture on ceasing to reside, see *Ridgway v. Woodhouse* ⁽¹⁾; *Clavering v. Ellison* ⁽²⁾; [392 *Fillingham v. Bromley* ⁽³⁾].

July 24. Their lordships having reserved their judgment, it was now delivered by

THE RIGHT HON. SIR MONTAGUE E. SMITH: The questions in this appeal arise upon a clause in the will of the late Hon. Prosono Coomar Tagore, making provision for the cesser of the estate of the persons entitled under the limita-

⁽¹⁾ 7 Beav., 437.

⁽²⁾ 7 H. L. C., 707.

⁽³⁾ 1 T. & R., 530.

tions of the will in the event of non-residence in his Boito-kanah house.

The will by which the testator devised his estates, after the determination of the life estate given to Juttendro Mohun Tagore (the first respondent), to Juttendro's sons successively in tail male, with subsequent limitations over, according to English forms of limitations, underwent much consideration in the courts in India and in this tribunal. The final decision, speaking generally, was that the limitations in tail and subsequent limitations were contrary to Hindu law, and void, and that upon the expiration of the first life interest the appellant, the testator's only son, was entitled, as heir, to the estate.

It will be necessary, before considering the questions arising upon the clause of residence, to refer shortly to the scheme of the will and to some of its provisions. The testator expressly declared that his son, the appellant, should take nothing under his will. He devised all his real and personal property to four trustees (of whom Juttendro was one) in trust to get in the personalty, with an exception thus expressed: "Save and except the jewels, household furniture, and other articles in the personal use of the members of my family, and save and except such jewels, household furniture, books and libraries, carriages, horses, farmyard, and other articles as the person or persons for the time being beneficially interested in my real estate, or the income or surplus income arising therefrom under the limitations and declarations hereinafter contained and made, shall wish to 393] retain for his and *their own use." Upon trust, after paying debts and legacies, to invest the residue and pay out of the income divers annuities and the unexpended surplus of such income to the person who for the time being should be entitled to the beneficial enjoyment of his real property or the profits of it. And as to the realty, upon trust, until his debts, legacies, and annuities had been paid and fallen in, to collect the rents and profits, and apply them to pay his legacies and annuities, if the personalty should be inadequate, and subject thereto, to pay the residue to the person for the time being to whom he had devised his real estate under the limitations thereafter contained "for the absolute use of such person;" and he further directed that the trustees should hold the estate generally for the use and benefit of such person, so far as was consistent with the trusts and provisions of the will. The testator directed that out of the income, after paying the necessary costs of managing his estate, "including the expense of the establish-

ments in the Mofussil and Calcutta," the person for the time being entitled to the beneficial enjoyment or surplus income of his real property should receive Rs.2,500 a month, or Rs.30,000 a year. As soon as the legacies and annuities were paid, and had fallen in, the trustees were directed to convey the real estate unto and to the use of the persons who should be entitled to the beneficial interest therein.

The will, after mentioning numerous legacies and annuities, contains the specific limitations of the realty, which are introduced by a preamble, stating, amongst other things, that the testator was possessed of a talook in Zillah Rungpore, subject to a jumma of Rs.40,555, and of the Boitokanah house, land, and premises where he usually resided. He then devises (subject to the devise to the trustees) his "real property," and "also library, horses, carriages, farmyard, furniture of the Boitokanah, jewels, gold and silver plate, &c., unto and to the use of Juttendro (the respondent) for his natural life, with the limitations over which have been already referred to.

The clause in question as to residence is as follows:

"Provided always, and I hereby declare that if any devisee or tenant for life, or entail, or otherwise, or any person entitled to take as heir by descent, or adoption, or otherwise, or in any manner *under the limitations herein- [394 before contained, shall permit or suffer the said property so devised and limited, as aforesaid, or any portion thereof, to be sold for arrears of government revenue, or shall after attaining his majority cease to keep up in a due state of repair, and to use as his residence in Calcutta, the said Boitokanah houses and premises where I now reside, and make use and enjoy my library, horses, carriages, farmyard, furniture in the said house, and jewels, gold and silver plates, &c., in my use and possession, then and immediately thereupon the devise and limitations in this my will contained and declared shall wholly cease and determine as to him, and the person next in succession to him under the limitations aforesaid shall at once succeed as if the said person so permitting or suffering the said property, or any portion thereof, to be sold for arrears of government revenue, or so ceasing to keep up in a state of repairs, and to use as his residence my said Boitokanah house, had then died."

It was contended in the former suit by the appellant that Juttendro's life estate was void, owing to the uncertainty of the period at which it was to commence. But it was held by this tribunal that there was no uncertainty, for his interest was to begin at once. It is said in the judgment:

"Their lordships read this will, alike according to its words and substance, as giving a life interest subject to a charge for payment of legacies and annuities, whereby the rents over and above Rs.2,500 per month, and the expense of maintenance, are to be applied in aid of another fund until the legacies and annuities are paid."

The testator died on the 30th of August, 1868. This suit was brought by the appellant on the 18th of November, 1872, to have it declared that the interest of Juttendro had ceased by reason of his non-compliance with the clause relating to residence, and that the appellant, as heir, was entitled to the estate, subject to the legacies and annuities.

Three distinct grounds of answer were argued at the bar. 1. That the limitations to take effect on the determination of Juttendro's interest having been declared to be void, the condition was not binding, and the heir could take no advantage of a breach of it. 2. That the condition would not attach until Juttendro became entitled to a conveyance from the trustees on the death of the last annuitant; and 3. That, if this were not so, there had been in fact no breach of the condition.

On the first point their lordships, as they intimated during the argument, find no difficulty in holding that, as the clause provides for the cesser and determination of the life interest of the respondent in the event of the conditions in it not being performed, his interest, notwithstanding the conditions over have been declared void, would cease when that event happened, and the appellant would be entitled to succeed as heir.

On the second point, it was contended for the respondent that, having regard to the other causes of forfeiture, and especially that for non-payment of the government jumma, which far exceeded in amount the annual payment of the Rs.30,000, to which alone he was entitled before there was a surplus income, the testator could not have intended that the clause should come into operation until the trusts were at an end and the donee's estate was perfected by a conveyance.

It was urged, on the other hand, by the appellant's counsel, that the clause should be read distributively. They contended also that Juttendro, according to the language and substance of the decision of this tribunal, had a present life interest subject only to the charge for payment of legacies and annuities. It was pointed out that the testator, in requiring the library and furniture to be used with the house, contemplated an immediate residence in it. And it was

observed that Juttendro had actually recovered the possession of the Boitokanah house in a suit against the trustees, so that if the respondent's contention were correct, he might, it was said, hold the house, and be in the enjoyment of all the rents and profits of the estate, except what might be required to pay the last annuitant, without being subject to the condition of residence until that annuitant died. Their lordships would be reluctant to put a construction on the clause which would have the effect of virtually defeating it, nor is it necessary for them to do so, since they agree with the judgment of the High Court in favor of the respondent on the third point, viz., that there has been no breach, in fact, of the condition.

*Boitokanah appears to mean a house, or the part [396 of a house, used for sitting or reception rooms, where entertainments are usually given, and business transacted. The ladies of the family do not commonly enter these rooms, which, when in the same house with the Zenana, are usually the outer rooms.

The manner in which the testator himself used the Boitokanah house, is thus found by the High Court :

"It appears from the evidence that the testator possessed a family dwelling-house as well as the Boitokanah, the two houses being completely distinct, and, indeed, situated on different sides of the same street: that some time before his wife's death he ceased to sleep in the family dwelling-house, after having complained of defective ventilation in his sleeping chamber there; that, thenceforth he slept at the Boitokanah; that subsequently, during his wife's life, he took his mid-day or principal meal in the family dwelling-house and his evening meal in the Boitokanah; that after his wife's death he took both meals in the Boitokanah, but the mid-day meal was taken in native fashion and was cooked at the family dwelling-house, and the evening meal was taken in European fashion and was cooked at the Boitokanah; that he gave his native, or strictly Hindu entertainments in his family dwelling-house, and his European entertainments at the Boitokanah; that the testator's family idols were always lodged and worshipped at his family dwelling-house and never at the Boitokanah; and that, at the Boitokanah, all the affairs of his estate were conducted and the necessary establishment kept up and lodged."

The opinion of the High Court on the nature of the residence imposed by the condition, is thus expressed :

"We think it is to be gathered from the will that the testator never intended the Boitokanah to be occupied as a

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dwelling-house in the ordinary sense of a Hindu dwelling-house." And again, "We are of opinion that the residence intended by him was an occupation for the purposes of transacting business and of receiving male friends and visitors, and if the occupant of the house for the time being so desired (but not otherwise), for entertaining male friends with hospitality: and we are further of opinion that 397] such an occupation does not require that either *the occupant or the ladies of his family should sleep in the house."

Their lordships think that, in the main, the High Court have properly construed the clause; and they understood the appellant's counsel not to dispute this construction but to contend that the evidence showed that the clause, so construed, had not been complied with.

Several English decisions were cited during the argument, as to the meaning of the word "residence." The principle, if any can be said to result from them, seems to be that where in a conditton of residence no manner or period of residence is prescribed, but residence simply and without definition, exclusive residence is not supposed to be meant; and that in such cases the occasional use of the house, and keeping an establishment in it, with the intention of again using it as a residence, is a sufficient compliance with the condition. In one case Lord Eldon seemed to think a condition imposing residence generally, was so vague that it was doubtful whether it could be enforced; and he held that, at all events, slight and rare instances of actual residence by the donee were, when the house was kept open by servants living in it, sufficient to satisfy so general a direction: *Fillingham v. Bromley* (1). In a case, *Rex v. Sargent* (2), where residence was a necessary qualification for the office of bailiff of a borough, Lord Kenyon said:

"It never can be contended that in order to constitute a residence in any place, it is necessary to reside any given number of days or even any great part of the year. It happens perpetually that persons have different places of abode, in some of which they reside more or less, as suits their convenience."

The words of the present clause are, "*cease to use* as his residence in Calcutta." It was not disputed that a reasonable time must be allowed to the donee after the testator's death for the commencement of the residence, before it could be imputed to him that he had ceased to reside. The testator died on the 28th of August, 1868, and the respondent

(1) 1 T. & R., 530.

(2) 5 T. R., 466.

did not, it would appear, use the Boitokanah in any sense as a residence, until some large *repairs were com- [398 pleted in October, 1872. During this interval of time he visited the house, and transacted the business of the estate there as one of the trustees, and durwans paid by the trustees were kept in it.

The first question is, whether in the interval referred to, the respondent could reasonably be required to commence using the house as a residence. The circumstances relied on by his counsel to justify the delay are (1), The pendency of the great suit brought by the appellant to defeat his title altogether, which was begun in August, 1868, and finally disposed of on appeal to Her Majesty in July, 1872; (2), His inability to get possession of the entire house from the trustees, which he only succeeded in obtaining by a suit commenced in May, 1870, and ended in March, 1872; and, (3), The unfit state of the house for residence, owing to the want of repairs.

With regard to the first ground, it is certainly little in accordance with reason that the appellant who disputed in the suit referred to the respondent's right to possession, and would, if his suit had been successful, have ejected the respondent from the house with the loss of any money he might have expended on it, and with the liability to account for mesne profits, should now be heard to claim the estate on the ground that the respondent did not take possession during the time covered by this litigation. But without saying that the appellant is estopped by his own conduct from taking advantage of the condition, their lordships think that the delay is justified by the other two grounds referred to.

It seems that in the testator's lifetime the lower part of the house was used for the transaction of the business of the estate, and a small room on the upper and principal floor of the house was also used as an office. The respondent, whilst willing to allow the lower part of the house to be used as before, objected to the retention of the upper room by the trustees. The result of the suit he brought against the trustees was that he was declared to be entitled to the possession of the whole house. Their lordships cannot but think he might reasonably object to use it as a residence until this question was settled. The testator might have found no inconvenience in having the room occupied as an *office when the manager was his own servant, but the [399 inconvenience to the respondent might be great when a clerk

appointed by the trustees was installed within the precincts of the residential part of the house.

But a stronger ground to justify the delay existed in the state of the house and its want of repair. Mr. Allen, the surveyor, who saw the house two or three months before the testator died, says it was much in want of repairs at that time. Soon after his death, it was necessary to take down and rebuild a portion of the east wall at a cost of Rs.6,200. But further extensive repairs were required. The trustees having hesitated to do them, the respondent requested Mackintosh & Co. to survey the house, who made a report to him that "the building throughout is urgently in need of repair." This report he sent to the trustees, with a request that the repairs should be executed. The trustees declined to do them on the ground that the obligation lay upon the respondent, who, upon this refusal, commenced in December, 1871, a suit against them, and in March, 1872, obtained a decree ordering the trustees to repair. The repairs so ordered were commenced in July, and completed in November, 1872, at a cost of Rs.14,000. Mr. Allen, the surveyor, says "the Rs.14,000 was necessary to make the house safe. The house was entirely out of repair, and some portion of it very dangerous."

The respondent entered into possession in October, 1872, before the repairs were entirely completed, and their lordships agree with the High Court in finding that up to this time there had been no unreasonable delay on the part of the respondent in commencing to reside, and that no breach of the condition had then occurred.

The conclusion at which, on this point, their lordships have arrived, is sufficient to dispose of this suit, which was brought on the 18th of November, 1872, immediately after the completion of the repairs, in favor of the respondent; but as evidence was given of the subsequent use of the house, and the High Court expressed an opinion upon it, their lordships, to prevent future litigation, desire to state that on this point also they think the view of the High Court is correct.

The respondent, who appears to adhere more strictly than 400] the *testator to Hindu usages, has no doubt continued to take his meals and sleep in the family house, where the other members of his family live; but this mode of living is not of itself inconsistent with such a residence in the Boitokanah house as the testator, in imposing the condition on his Hindu descendants, must be supposed to have contemplated. It appears upon the evidence that, since the respon-

dent entered upon possession the house has been constantly kept open, new furniture has been added to the old, the library taken care of, and not only durwans but menial servants have lived in the house. The respondent himself frequently, if not daily, went to the house, and usually spent several hours there. It appears, also, that he transacted all affairs of business there, and on some occasions received visitors in rooms properly furnished for their reception. These acts appear to their lordships, having regard to the nature of a Boitokanah house and to Hindu usages, to amount to the use of it as a residence.

It was strongly urged by the appellant's counsel, that any entertainments the respondent might give ought to take place in the Boitokanah, and it was said he had always given them at his family dwelling-house. The omission, however, to use the Boitokanah for this purpose may be accounted for and excused by the condition of the house up to the bringing of this suit. With regard to future entertainments their lordships cannot hold that the respondent is in any way obliged to give them, although, in case he thinks fit to do so, he would best comply with the testator's will by using the Boitokanah house on some, at least, of these occasions.

Some stress was laid on the fact that a part of the furniture and jewels had been removed from the Boitokanah to the family dwelling-house. But it seems this was done during the repair of the house, and the furniture was brought back or replaced, and afterwards used in it. The jewels were always kept at the family house, and were so kept there for greater safety; but the language of the condition in no way confined the use of the jewels to the residence in the Boitokanah.

Their lordships observe with satisfaction that this suit has been brought to a conclusion with commendable expedition. It was commenced in November, 1872, and within twenty months from *that date their lordships are able to [40] report upon this appeal to Her Majesty. This instance shows that appeals from India, if prosecuted with vigor, may now be speedily determined.

In the result, their lordships will advise Her Majesty to affirm the decree of the High Court to dismiss this appeal, with costs.

Solicitors for the appellant: *J. S. & A. S. Judge.*

Solicitor for the respondent: *T. L. Wilson.*

1874 Ganendro Mohun Tagore v. Rajah Juttendro Mohun Tagore. J.C.

Where one leased for twenty-one years, if the tenant, his executors, etc., should so long continue to inhabit and dwell in the farm house, and actually occupy the lands, etc., and not let, set, assign over or otherwise depart with the lease; held that the tenant having become bankrupt, and his assignees having possessed themselves of the premises and sold the lease, and the

bankrupt being out of the possession and actual occupation of the farm, the lessor might maintain ejectment without a previous re-entry, the continuance of the term itself being made to depend upon the lessee's actual occupation. *Doe v. Clarke*, 8 East, 185; *Doe v. Carter*, 8 Term R., 57, 800; *Doe v. Hawke*, 2 East, 481.

CASES
 DETERMINED BY THE
COURT OF QUEEN'S BENCH,
 AND BY THE
COURT OF EXCHEQUER CHAMBER
 ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,
 IN AND AFTER
EASTER TERM, XXXVII VICTORIA.

[Law Reports, 9 Queen's Bench, 350.]

April 29, 1874.

***THE QUEEN v. THOMAS CASTRO, otherwise ARTHUR [350
ORTON, otherwise SIR ROGER CHARLES DOUGHTY TICH-
BORNE, Baronet. (1)]**

Certiorari removing Indictment for Perjury from Central Criminal Court—Specification of County in which Offence shall be tried and Jury summoned—9 & 10 Vict. c. 24, s. 3—Trial at Bar—Appointment of Days in Term and Vacation for Trial—Adjournment of Trial at Bar—Sentence on Conviction passed out of Term—11 Geo. 4 & 1 Wm. 4, c. 70, s. 7—Perjury on Oath taken in Chancery before Commissioner—16 & 17 Vict. c. 78—Sentence of Penal Servitude—2 Geo. 2, c. 25—Sittings at Nisi Prius at Westminster, where to be holden—18 Eliz. c. 12—33 Vict. c. 6, s. 7.

By 9 & 10 Vict. c. 24, s. 3, every writ of *certiorari* for removing an indictment from the Central Criminal Court shall specify the county or jurisdiction in which the same shall be tried, and a jury shall be summoned and the trial proceed in the same manner in all respects as if the indictment had been originally preferred in that county or jurisdiction.

An indictment was found by the grand jury in the Central Criminal Court for perjury committed within the jurisdiction of the Central Criminal Court. The perjuries assigned in one count were in respect of an oath taken before a commissioner in Chancery, in the city of London; and in the other count, in respect of an oath taken in the Court of Common Pleas, in Middlesex. The indictment was removed by *certiorari* into the Court of Queen's Bench, and Middlesex was specified as the county in which the indictment should be tried, and the jury were taken from that county:

(1) This case was very briefly reported from *Cox's Criminal Cases*, 6 Eng. Rep., 317; owing to the notoriety and importance of the case, this more elaborate report is deemed proper. M.

Held, that the Court of Queen's Bench had a discretion to name in the *certiorari* the county or jurisdiction in which the trial was to take place, and that by the jurors summoned from that jurisdiction the same issues could be tried that would have been tried in the Central Criminal Court had the indictment not been removed.

By 11 Geo. 4 & 1 Wm. 4, c. 70, s. 7, if a trial at bar shall be directed by any of the superior courts, it shall be competent for the judges of such courts to appoint such day or days for the trial thereof as they shall think fit; and the time so appointed, if in vacation, shall, for the purposes of such trial, be deemed and taken to be a part of the preceding term.

A trial at bar having been ordered, in an indictment for perjury, the Court of Queen's Bench, in Hilary Term, appointed for the trial the 23d of April, 1873, and every day up to and inclusive of the 1st day of November, 1873, and further ordered that, in case the trial should not terminate on or before the 1st day of November, 1873, the further trial should be adjourned till Michaelmas Term next, and be thereafter continued at such times as the court should then direct. The court did not sit continuously, but adjourned not only over Sundays and holidays, but also over days included in this period on which it might have sat. The court afterwards, in Michaelmas Term, 1873, made a second order, appointing every day in Michaelmas Term, 1873, and every day up to Michaelmas Term, 1874, for the trial. On the 28th of 35 E] February, 1874, a day in vacation after *Hilary Term, the defendant was found guilty, and the court immediately passed sentence on him:

Held, that the court had, under the above enactment, power to appoint such days as they should think fit for the trial, and that it was not necessary that this power should be exercised once for all, or that it should be limited to the appointment of days in the vacation next succeeding the term in which the order was made.

Held, also, that, as an incident to the trial at bar the court had power to adjourn from time to time.

Held, also, that a sentence, passed out of term, but on one of the days which, by virtue of the above enactment, are, "for the purposes of the trial, to be taken as part of the preceding term," was good, passing sentence being part of the trial.

The opinion of the judges in *O'Connell v. The Queen*, (11 Cl. & F., at p. 250), dissented from on this point.

The 2 Geo. 2, c. 25, s. 2, imposes the sentence of transportation (now altered to penal servitude) on persons convicted of perjury according to the laws then in being. The defendant was convicted of perjury on an indictment, one count of which averred that the oath was taken in the Court of Chancery before a commissioner authorized to take an oath by 16 & 17 Vict. c. 78; he was sentenced to penal servitude upon that count:

Held, that the offence of perjury consists in taking a false oath in a judicial proceeding, and whether the oath is taken in a judicial proceeding before a court at common law, or acting under a statute, it is equally an oath taken in a judicial proceeding, and punishable by penal servitude.

Under 33 Vict. c. 6, s. 5, sittings at *nisi prius* for Middlesex may be held at the Sessions House, Westminster, instead of in Westminster Hall.

INDICTMENT for perjury. The first count contained assignments of perjury committed upon the trial of an action of ejectment, *Tichborne v. Lushington and Others*, at Westminster, in the county of Middlesex, before Bovill, C.J., in the Court of Common Pleas. The second count contained assignments of perjury contained in an affidavit sworn before a commissioner duly appointed to administer oaths in chancery in the city of London.

The indictment was removed by *certiorari* into the Court of Queen's Bench, and, on the motion of the Attorney-General, a trial at bar was ordered. The trial which took place before Cockburn, C.J., Mellor and Lush, JJ., began on the 23d of

April, 1873, and terminated on the 28th of February, 1874, when the defendant was found guilty and sentenced to seven years' penal servitude on each count of the indictment.

April 18. *Kenealy*, Q.C., (*M' Mahon* and *Cooper Wyld* with him), moved for a rule *nisi* for a new trial, or to arrest the judgment, or *for a *venire de novo*, on the following grounds: first, that the trial of the action of ejectment, at which the oath was administered, and which was alleged to be perjury as mentioned in the first count, was held before Bovill, C.J., not in Westminster Hall, but at the Sessions House, in Westminster, and that the Chief Justice, sitting at the Sessions House at Westminster, had no power to administer an oath; and although the sitting at the Sessions House was adjourned by the consent of the defendant, yet that consent did not give jurisdiction. He referred to 18 Eliz. c. 12; Vin. Abr., tit. "Trial," (S a. 2), *Vansittart v. Taylor* (*); *Lawrence v. Wilcock*.(*)

Secondly, that the perjuries assigned in the second count were in respect of an oath taken before a commissioner in chancery, in the city of London, and that the offence, having been committed in the city of London, could not be tried by a jury summoned from the county of Middlesex. He referred to 4 & 5 Wm. c. 36, ss. 2, 4; *Reg. v. Mitchell*.(*)

Thirdly, that under 9 Geo. 4 & 1 Wm. 4, c. 70, s. 7, the court in banco can only make one appointment for one term and the succeeding vacation for a trial at bar, and that the court sitting at the trial at bar had no power to adjourn the trial from the 31st of October to the 17th of November.

Fourthly, that the sentence, having been passed on the defendant out of term, was a nullity: *O'Connell v. The Queen*.(*)

Fifthly, that the offence for which the defendant had been convicted on the second count was not perjury for which a sentence of penal servitude could be imposed: 16 & 17 Vict. c. 78; 2 Geo. 2, c. 25, s. 2.

The facts of the case sufficiently appear from the judgment.

Cur. adv. vult.

April 29. The judgment of the court (Cockburn, C.J., Blackburn, Lush and Quain, JJ.) was delivered by

BLACKBURN, J.: In this case an indictment was found by the grand jury in the Central Criminal Court for perjury committed within the jurisdiction of the Central Criminal Court. It was removed into this court by writ of *certiorari*,

(*) 4 E. & B. 910; 24 L. J. (Q.B.), 198.

(*) 11 A. & E., 941.

(*) 2 Q. B., 636.

(*) 11 Cl. & F., per Tindal, C.J., at p. 250, and per Lord Lyndhurst, C., at p. 325.

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which, as required by statute 9 & 10 Vict. c. 24, s. 3, specified Middlesex as the county in which it should be tried. On the application of the Attorney-General it was ordered that the trial should be at bar. This court, in Hilary Term, under statute 11 Geo. 4 & 1 Wm. 4, c. 70, s. 7, appointed for the trial the 23d of April, 1873, (being a day in Easter Term), and every day up to and inclusive of the 1st day of November, 1873, being the day before the first day of Michaelmas Term, and further ordered that in case the trial should not terminate on or before the 1st day of November, the further trial should be adjourned till Michaelmas Term next, and be thereafter continued at such times as the court should then direct. The jury was taken from the county of Middlesex, and the trial at bar commenced. The court did not sit continuously, but adjourned not only over Sundays and holidays, but also over days included in this period on which it might have sat; and in particular, there was an adjournment from the 31st day of October, 1873, to the 17th day of November, 1873, which was a day in Michaelmas Term. To this last adjournment the defendant's counsel objected, and the court adjourned without any consent.

The trial having been protracted, this court, in Michaelmas Term, 1873, made a second order, appointing every day in Michaelmas Term, 1873, and every day up to Michaelmas Term, 1874, for the trial. The trial proceeded, and on the 28th day of February, 1874—a day in the vacation before this term—the defendant was found guilty, and the court then passed sentence on him of penal servitude on each count. Within the first four days of this term, the counsel for the defendant moved for a rule *nisi* for a new trial, or to arrest the judgment, or for a *venire de novo*, on grounds which will be presently noticed, most of the objections having been taken and disposed of during the trial at bar.

It must not be supposed that by entertaining the motion for a new trial we express any opinion as to the competency of the court to rehear and reconsider points of law already decided by the same court when sitting at bar. It will be 354] time to decide this *point when it becomes necessary to do so, but we are desirous of guarding ourselves against any inference in favor of such a proposition from the fact of our having heard the application.

We are all of opinion that no ground whatever has been shown for doubting that the proceedings from first to last have been perfectly regular, that the verdict was properly obtained, and is quite satisfactory, and that the sentence

was properly passed by the court, sitting in banc, on a day which, by 7 Geo. 4 & 1 Wm. 4, c. 70, s. 7, was for the purposes of this trial at bar to be taken to be part of the preceding term, viz., Hilary Term, 1874. We pronounced at once our reasons for saying that there was no color for the motion for a new trial on the ground that the verdict was unsatisfactory on account of the way in which it was obtained. On the other grounds of motion we postponed giving our reasons, not from any doubt entertained by any member of the court, but because this being in some respects a new case, we were desirous of expressing our reasons precisely, so as to be an assistance to our successors, if a similar case should occur again.

We now proceed to deal with the different objections made as they arose in order of date, without regard to the order in which the counsel brought them forward. The indictment, as already stated, was originally preferred in the Central Criminal Court, a new court, created by statute 4 & 5 Wm. 4, c. 36, with a jurisdiction including the city of London, the county of Middlesex, and parts of the counties of Essex, Kent, and Surrey. The grand jury in that court had jurisdiction to find a bill for offences committed within any part of this jurisdiction, and trials in the Central Criminal Court are, by the 4th section, to be by jurors "taken wholly from the said city or the said counties, or taken indiscriminately from the said city and the said counties." The *certiorari* is not taken away, and therefore an indictment found in the Central Criminal Court may be removed into the Court of Queen's Bench, and may be there tried; but the original act does not contain any express provisions as to the manner in which the jury are to be summoned in the Queen's Bench. As the issue to be tried is, whether the offence charged by the indictment was committed within the jurisdiction of the Central Criminal Court, it may, on the trial of any indictment, appear that the *offence was com- [355 mitted in any one of the five counties out of which that district is formed, and it did in fact appear on the trial of the case now before us that the perjuries assigned in one count were in respect of an oath taken in chancery within the city of London, and that the perjuries assigned in the other count were in respect of an oath taken in the Court of Common Pleas in Middlesex. On this it was contended that the *venire* summoning a jury from Middlesex was originally wrong, or, at least, that when it appeared that one of the offences charged took place in London, the court should have ruled that the Middlesex jurors could not try that

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offence. But the legislature have, by a subsequent enactment, foreseen and provided for this difficulty. Statute 9 & 10 Vict. c. 24, s. 3, is as follows: "And whereas doubts have been raised as to the proper place of trial where indictments have been removed by writ of *certiorari* from the Central Criminal Court into the Court of Queen's Bench, be it enacted that every writ of *certiorari* for removing an indictment from the said Central Criminal Court shall specify the county or jurisdiction in which the same shall be tried, and a jury shall be summoned and the trial proceed in the same manner in all respects as if the indictment had been originally preferred in that county or jurisdiction." We cannot doubt that the true construction of the statute is that the Court of Queen's Bench shall have discretion to name in the *certiorari* the county or jurisdiction in which the trial is to take place, and that by the jurors summoned from that jurisdiction the same issues shall be tried that would have been tried in the Central Criminal Court had the indictment not been removed. These objections, therefore, fail.

The next objection relates to the order of the court made in the Hilary Term, 1873, directing that a number of days should be appointed for the trial, extending beyond the then next term, and the long period then appointed having proved too short, a second order was made in Michaelmas Term, 1873, appointing further days. It was contended that a trial at bar, if it could be protracted beyond the first vacation after it began, was necessarily to fail. It is a sufficient answer to cite the words of the statute 11 Geo. 4 & 1 Wm. 4, c. 70, s. 7: "If a trial at bar shall be directed by any of the said courts, it shall be competent for the judges of such 356] *courts to appoint such day or days for the trial thereof as they shall think fit; and the time so appointed, if in vacation, shall, for the purposes of such trial, be deemed and taken to be a part of the preceding term." It is impossible to use words more clearly declaring that the court should have the most absolute discretion to appoint such days as they should think fit for the trial; and there is nothing either in the object of the enactment or the language used to require either that this power should be exercised once for all, or that it should be limited to the appointment of days in the vacation next succeeding the term in which the order was made.

It was then contended that the adjournment of the court vitiated the whole proceedings. It is scarcely possible to suppose that this objection was seriously made. The court was sitting on a day which, for the purpose of the trial, was

to be taken as part of the then preceding term. It is incident to a trial that the court may, for sufficient reason, adjourn it, and there is nothing whatever, either in the words of the enactment or the object of the legislature, to take away this power from the Queen's Bench sitting on a trial at bar in what is by legislative enactment to be taken as part of the term.

Two objections were then made arising on the evidence at the trial. It appeared that the trial at *nisi prius*, before the Chief Justice of the Common Pleas, was in fact holden in the Sessions House at Westminster, and not in any sense of the words "within Westminster Hall." It was argued that the sittings of the Court of Common Pleas at *nisi prius* in Middlesex were held only under the authority of 18 Eliz. c. 12, which authorizes sittings within "the said hall called Westminster Hall, in Westminster." And therefore it was said that a witness on a trial at *nisi prius*, held, as this in fact was held, near to but not in Westminster Hall, could not be there guilty of perjury. We should be most reluctant to give any countenance to the notion that on a trial before one of the judges of the superior courts, who has general jurisdiction over the subject, a witness might commit perjury with impunity on account of any defect or irregularity in the proceedings, especially when, as in this case, the irregularity if it were one, was waived by the parties, who, though they cannot by consent give jurisdiction, can waive an irregularity. But it is quite *unnecessary [357 to consider that, for by the statute 33 Vict. c. 6, s. 5, "any number of judges may at one and the same time hold a sitting or sittings at *nisi prius* either in London or Westminster, as may be deemed expedient by the court." The rooms in which the ordinary sittings of the superior courts at *nisi prius* are held in Middlesex are limited in number, and when more judges sit at *nisi prius* than usual, some must sit elsewhere. It was for that reason that the ejectment was tried in the Sessions House in Westminster, and we think it quite clear that the statute 33 Vict. c. 6, made such a course quite regular. We by no means say that the law previously was that the sittings at *nisi prius* were to be holden only in the usual courts, which if they are "within the hall called Westminster Hall" are only so constructively; but only that, if it was so, it is so no longer.

A further objection was made that the oath on which the perjuries in one count were assigned was taken in the Court of Chancery, before a commissioner authorized to take the oath by 16 & 17 Vict. c. 78. It was said that the sentence of

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penal servitude on this count could not be justified, because the oath was taken in a manner not authorized by the law at the time 2 Geo. 2, c. 25, which imposed the sentence of transportation (now penal servitude) on perjury, was passed. This is quite unfounded. The offence of perjury consists in taking a false oath in a judicial proceeding, and whether the oath is taken in a judicial proceeding before a court at common law, or acting under an earlier or later statute, it is equally an oath taken in a judicial proceeding, and equally perjury, and equally punishable by penal servitude.

One more objection was taken. The sentence in the present case was passed by this court when the verdict was delivered, not in term, but on one of those days which, by virtue of the statute 11 Geo. 4 & 1 Wm. 4, c. 70, s. 7, already cited, are, "for the purposes of the trial, to be deemed and taken as part of the preceding term." ⁽¹⁾ It was argued that the court could do nothing during those days but take the verdict, and that consequently sentence could not be then passed, but of necessity be delayed till the next or some ensuing term. If this were so, it would follow that we should treat the sentence actually passed as a nullity, and, on the application of the prosecution, grant a rule to bring up the defendant during term, and then pass the sentence that appeared to the court as then constituted to be the proper one. Great inconvenience would arise from pursuing this course, and no benefit to any one is likely to result; but still, if such was the course prescribed by the law, we must follow it, however troublesome and useless it might be. We are, however, clearly and undoubtingly of opinion that it was competent for the court to pronounce sentence at the time. As on this point an authority was cited, it is necessary to examine the question fully, as we dissent from that authority. All courts of oyer and terminer sit for the trial of the causes brought before them. If the issue raised during the trial of one of these causes be on matter of fact, it is to be tried by the jury, under the supervision of the court. If it is matter of law, it is to be tried by the judges; if matter of record, by the record itself: *see Terms de la Ley*, "Trial." The question what the sentence in a criminal cause should be is a question of mixed law and judicial discretion, to be guided by the facts proved on the taking of the verdict, and therefore is to be determined by the judges, and so it is properly and technically included in the word "trial." The trial by the court of the cause before it includes all those, and the word "trial" is not confined to

(1) Ante, p. 355.

taking the verdict. The superior courts sat at common law only during term time and at Westminster. When an issue of fact arose which required to be tried by the verdict of a jury, process issued to bring up the jurors from the proper venue to Westminster, and the verdict was found there under the superintendence of the court sitting during term, and if for any sufficient reason the whole trial was not completed during the term in which it began, the cause was adjourned, and the trial completed at a future sitting or sittings of the court, which were necessarily holden in term time. As early as the Statute of Westminster the Second, 13 Ed. 1, A.D. 1285, a remedy was provided for part of the inconvenience, expense, and delay arising from this state of the law. By that statute power was given to the courts at Westminster to award a writ of *nisi prius* commanding the sheriff to bring the jury to Westminster in the next term, "unless the justices of assize should first come to his county." And in case *such a writ was awarded, the [359] justices of assize were to take the inquisition, and return the same to the court at Westminster, where judgment should be given. In practice it became a matter of course to award a writ of *nisi prius* in every case, unless either the Crown was a party concerned, and refused its assent, or the court in its discretion thought fit to direct that the trial should be at bar on account of the importance of the case. In either case the trial proceeded in the court in term time at Westminster, as at common law. It was not usual to issue a commission of assize in Middlesex, and consequently, in causes in which the venue was in Middlesex, all trials remained as at common law till a much later period, when, by various statutes which it is unnecessary to cite, the Chief Justices and Chief Baron were directed to hold sittings at *nisi prius* in London and at Westminster, and the award of *nisi prius* in town causes is, therefore, "unless first the Chief Justice come," &c.

In all respects material to the question before us the law and practice is the same in town and in country causes. The direction of the court would more properly have been called a direction that there should be no award of *nisi prius* than a direction that the trial should take place at bar; but the latter phrase has been in use so long that it would be pedantry to try to alter it now. Substantially the law remained the same down to the passing of the statute 11 Geo. 4 & 1 Wm. 4. Two inconveniences were found to result in practice, which the statute was designed to remedy. The first was that in the comparatively rare cases in which there

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was a trial at bar, it must necessarily be in term time, to the great delay of all the ordinary business of the court, and if the trial was not completed within the term in which it began, it must of necessity be adjourned till the next term, and then completed. The other inconvenience was that when there was a criminal trial in the Queen's Bench, and there was an award of *nisi prius*, the authority of the judge on circuit or Chief Justice at *nisi prius* being, not to try the cause, but simply to take the inquisition, sentence was of necessity postponed till the next term. Whenever that sentence was discretionary, the court in banco was very much guided by the report of the judge who presided when the criminal was found guilty, but it was necessary to bring that report before the court, and there was much delay and expense 360] *occasioned both to the prosecution and to the defendant. Both these inconveniences were, amongst others, remedied by the act for the more effectual administration of justice in England and Wales, 11 Geo. 4 & 1 Wm. 4, c. 70. By the 9th section it was provided that judgment might be pronounced by the judge at the sittings or assizes, subject to a power in the Court of King's Bench, within the first six days of the next ensuing term, to grant a rule to amend the judgment. In *The King v. Lloyd*(¹) a motion was refused for such a rule. The judgment of Parke, J., very clearly indicates what the mischief was which it was meant to remedy—"To ground a motion of this kind the party ought to point out some essential defects in the sentence, otherwise we should lose, and not gain, by the enactment of the late statute; for after sentence had been passed at the assizes we should still be called upon in a number of cases to hear the report of the trial, affidavits, and speeches of counsel, in this court, as the practice was before the act." It is obvious that those who framed the act could not wish to introduce for the first time, in a trial at bar, a necessity to postpone sentence till next term, producing an inconvenience similar to that which was by the same statute taken away in the case of trials at *nisi prius*. Still it is possible that, from want of skill, they might use words which would compel us to say that such was the enactment; and if they had enacted that the days appointed, if in the vacation, should, "for the purposes of taking the verdict, and those only," be deemed to be a part of the preceding term, we should have had great difficulty in avoiding that conclusion. The objection taken is grounded on the assumption that the word "trial" in this act is to be construed as meaning "taking the verdict." But

(¹) 4 B. & Ad., 135.

in construing all writings it is a general rule that we are to understand the words used in their technical sense, if they have acquired one, or if not, in their ordinary sense, unless there be something to show that they are used in some secondary sense; and in *Heydon's Case* (1) Lord Coke says it was resolved, "that, for the sure and true interpretation of all statutes in general, be they penal or beneficial, restrictive or enlarging of the common law, four things are to be discerned and considered: 1. What was the common law before the making of the act; *2. What was the mischief [361 and defect for which the common law did not provide; 3. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; and 4. The true reason of the remedy; and then the office of all judges is always to make such construction as shall suppress the mischief and advance the remedy." We cannot doubt that the defect which the legislature intended to amend was that trials in the superior courts could not be holden except in term time, which was inconvenient when the verdict had to be taken before the court, and the remedy was that, when a trial at bar was directed in any cause, the court might appoint days for the trial, which, if in vacation, should, for the purposes of the trial of that particular cause, be deemed to be in term, and on which the court might therefore dispose of that cause just as they might at common law have done had those days been days in term time. To substitute for the word "trial" the words "taking of the verdict," or any similar words, or to construe the word "trial" as limited to the taking of the verdict, would be an alteration and straining of the words of the legislature for the purpose of defeating their obvious intention. We have no doubt that we cannot do so, and we should not have thought it necessary to render our reasons so much at length were it not for the expressions used by Tindal, C.J., in the opinion delivered by him in the case of *O'Connell v. The Queen* (2), which certainly are an authority to the contrary. It is to be remembered how that opinion came to be delivered. The Court of Queen's Bench in Ireland had, under the Irish Act (which is identical in its terms with the English Act), appointed days in the vacation after Hilary Term for the trial of that cause. On one of those days the jury delivered in a long special finding on the issues, and on this finding many troublesome questions arose. Had the verdict been delivered on a day which actually as well as constructively fell in Hilary Term, the Court of Queen's Bench might, and on such findings probably would,

(1) 3 Rep., 7 b.

(2) 11 Cl. & F., at p. 250.

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have postponed sentence till those points were argued, and for that purpose adjourned the cause till the next term; nor can any reasonable doubt be entertained that in point of fact the Court of Queen's Bench in Ireland did, on receiving these findings, declare that they would do so: for on the 362] *first day of the term—Easter Term—the parties did appear; motions were made on their behalf in arrest of judgment and otherwise, and after long arguments sentence was pronounced in Trinity Term. But when the record was made up and returned in obedience to the writ of error, all that appeared on the record was that these special findings were taken on the 12th of February, being one of the days which, by virtue of the statute, were, for the purposes of the trial, to be deemed part of Hilary Term; and that on the 15th of April, being the first day of the ensuing Easter Term, the parties appeared; and that having done so, and taken various steps in the cause it was continued into Trinity Term, in which the sentence was passed. The counsel for the defendants assigned thirty-three grounds of error, some of which were very serious, and on one of which the judgment was reversed. But many were frivolous, and amongst those was the twentieth objection—"that there was not any proper continuance from the time when the verdict was given to the following term, when judgment was pronounced." The House of Lords had to determine for the first time whether this objection was good, and whatever might have been the judgment if there had been a long series of precedents determining that the absence of a formal entry was fatal, it is obvious that there could be but one decision when it was a case of the first impression. The House thought fit to ask the judges, amongst other questions, whether this was a good ground for reversing the judgment. The unanimous answer of the judges, delivered by Tindal, C.J., was that it was not, and the judgment of the House was that it was not. But in delivering the reasons for that answer of the judges, Tindal, C.J., does, undoubtedly, state, as the ground of his opinion, that the day appointed was a day in term for the purpose of the trial, which no one doubts; but he assumes that the trial means in this statute the taking of the verdict, and nothing more (*). He gives no reasons for this assumption; it had not been argued at the bar of the House, and it evidently was not much considered. If this was part of the *ratio decidendi* of the lords in that case, we should be obliged to submit to it; but the opinions of the judges rendered to the House are but advice to assist the house, as was strongly

(*) 11 Cl. & F., at p. 250.

shown in that very case, *where the lords, by a ma- [363
jority of one, gave judgment contrary to the opinions of a
great majority of the judges. But though not binding on
us, the opinion of such an eminent lawyer as Tindal, C.J.,
is to be treated with great respect, and the more so as all the
other judges subscribed to his opinion, giving this as a rea-
son. We should not, therefore, presume to dissent from
that opinion if it were not that we find this point was not
argued, and the opinion seems to have been hastily adopted
without considering the reasons, which we think would have
brought those learned persons to an opposite opinion, and
which certainly lead us, without any doubt, to hold that the
sentence was in this case properly pronounced.

These are all the objections that were made, and we think
that none of them are tenable.

Rule refused.

Attorney for defendant: *C. Harcourt.*

[Law Reports, 9 Queen's Bench, 363.]

April 29, 1874.

REDGRAVE, Appellant; LEE and Others, Respondents.

*Factory Act, 1867 (30 & 31 Vict. c. 103), s. 3, subs. 7—"Factory"—Process carried
on in open Air—Manufacture of Cement.*

Premises, consisting of ten acres, in which the manufacture of cement from chalk
and mud is carried on chiefly in the open air, and in which 200 people are employed
in grinding and washing in mills, but in which there is no great building in which
men and women are employed under cover, are not a "factory" within 30 & 31 Vict.
c. 103, s. 3, subs. 7.

Kent v. Asley (Law Rep., 5 Q. B., 19) followed.

CASE stated by justices of Kent under 20 & 21 Vict. c. 43.

An information was preferred by the appellant, sub-in-
spectors of factories, against the respondents, under s. 28 of
7 & 8 Vict. c. 15, charging that they, on and at, &c., being
the occupiers of a certain factory within the true intent and
meaning of the Factory Acts, did unlawfully fail to hang
up in the entrance of the factory a notice of the names and
addresses of the inspector and sub-inspector of the district
in which the factory is situate, and other particulars required
to be inserted in the said notice.

At the hearing the appellant relied on s. 3, subs. 7, of 30
& 31 Vict. c. 103, which enacts that, "for the purposes of
this act the word factory" shall mean "any premises,
whether adjoining or *separate, in the same occupa- [364
tion, situate in the same city, town, parish, or place, and

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constituting one trade establishment in, on, or within the precincts, of which fifty or more persons are employed in any manufacturing process;" and by the same section, "manufacturing process" shall mean "any manual labor exercised by way of trade, or for the purposes of gain, in or incidental to the making an article or part of an article, or in or incidental to the altering, repairing, ornamenting, finishing, or otherwise adapting for sale any article."

The appellant called as a witness William Rayner, who said:

I am general foreman and timekeeper in the employ of Messrs. Lee & Son (the respondents). The premises are in the occupation of the respondents. Cement is manufactured on those premises, and lime also is burnt there. I know what cement is made of. Chalk is used in its preparation. Lime is not used in it. Mud is also used. The first process which chalk is subjected to in making cement is placing it into a wash-mill with mud. The chalk is first dug from a pit. After the chalk and mud leave the wash-mill it passes through pipes to a force pump, it is then forced through the pump into the backs, and there it deposits itself; it is then wheeled from the backs to the flues, and there dries, then passes from thence to the kilns; it is then burnt, then drawn from the kilns, then crushed, then ground between stones, then passed into a shed, and it then becomes cement ready for the market and is put into casks and sacks. There are over 200 people employed on the premises; these include pitmen, carters, lime burners, cement manufacturers, barge loaders, engine fitters, blacksmiths, wheelwrights, sawyers, engine drivers, kiln fitters, coal heavers, barge builders, fluemen, men employed at the wash-mills, spoutmen, millers, crushermen, kiln drawers, tippers. I recollect the inspector paying a visit to the premises on the 10th of June instant; there was then no notice on any part of the premises containing the names of the inspector and sub-inspector of factories of the district. I have never seen such a notice upon the premises.

On cross-examination the witness said:

The premises are very extensive. The chalk pit extends over three acres, and is a mile away from the works. There is a railroad from the pits down to the works; it is about a mile long. The other works occupy about ten acres. There is no great building where men and women are employed under cover. The mills are separate and detached, but stand upon the ten acres. There is a hole on the top of them, and on each side there is an open cowl over each of them. There are temporary covers over the mills in some places to protect the machinery. There are no boys working at the mills. I know Philip Peters; he does not work in any covered building. His duty is to tally the chalk into the wash-mill, and while doing so he stands in the open air; that is his only duty; he is under the age of sixteen years, and he is the only boy under that age employed on the works. The river is on one side of the works, and the works are all open to the country on all other sides. There is no entrance-gate which is 365] *used. There is an ordinary five-barred gate from the turnpike road which is opened for cattle to go in. There is no entrance-gate or place where a notice could be affixed without being exposed to the wind, rain, or weather.

On re-examination the witness said:

It is the habit of the men to come on to the premises just where they can; there is an entrance to drive a horse and trap through near the fitter's shop; that is the entrance by which strangers would enter the premises; there is an entrance at the end of the backs. This brings the men into any part of the works. The men come on the premises across a field, and through the entrance behind the pens. The men get over the fence, and get into the works where they can. A notice could be put up where the entrance is for a horse and trap,

but it must be placed outside. There is a boy who works in the engine fitting shop; his name is George Strong, he runs of errands and attends to the men, moves things about from one place to another for the use of the men. I know a boy of the name of Eyles. I do not know whether either of those boys are under the age of eighteen years. Most of the work is carried on under a felt cover open all round; there is no division between the cement works, the lime works, the carpenters' shop, and the fitting works; only the walls to support the buildings and gear. There is nothing to prevent anyone getting into the works in certain places where there are no fences. The railway runs at the top of the works; but there is a field between the works and the railway. That field is not part of the premises where manufacturing process goes on, the field is the boundary of those premises.

It was contended on the part of the respondents, that the premises were not a "factory" within the meaning of the Factory Acts; that the manufactory carried on is not one of those mentioned in s. 3 of 30 & 31 Vict. c. 103, or of a similar nature; that those acts apply only to closed buildings; that there is no separate building in which fifty persons are employed; that 30 & 31 Vict. c. 15, s. 3, subs. 7, does not apply to cement works like those in question, and that the principle involved in the case of *Kent v. Astley* (1) was precisely the same as in the present case; that the several sheds could not be considered as being joined together for the purpose of bringing them within the provisions of the Factory Acts; that only one boy is employed on the premises under the age of sixteen years, and he is employed out of doors in the open air as a tally boy, to see what chalk and mud is put into certain wash mills.

The justices, being of opinion that the evidence did not bring the case within the operation of 30 & 31 Vict. c. 103, s. 3, subs. 7, dismissed the information.

*The question of law for the court was, whether the [366 cement works and premises are within the operation of the Factory Acts.

C. Bowen, for the appellant, contended that the case was to be distinguished from *Kent v. Astley* (1), and referred to the Factory Act, 1871 (34 & 35 Vict. c. 104), s. 5.

Manisty, Q.C., (with him *Lee*), for the respondents, was not called upon.

COCKBURN, C.J.: I am of opinion that this case is governed by the decision in *Kent v. Astley* (1). No doubt it is very difficult to draw the line; but the definition of "factory" and of "manufacturing process," does seem to imply something more than a process which is carried on to all intents and purposes in the open air. If buildings predominated this might be a factory; but the whole may be said to be carried on in the open air. By the late act, brickfields have

(1) Law Rep., 5 Q. B., 19.

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been to a certain extent, brought under the operation of the Factory Acts; but the legislature have not thought proper to go further, and extend the general definition of factory.

BLACKBURN, J.: I am of the same opinion. In *Kent v. Astley* (1) all the court were agreed that the operation of the act of 1867 was confined to trades carried on in buildings; and that is fully justified by the definition of "factory" and "manufacturing process." [The learned judge read the definitions.] If it appeared in the present case that in the ten acres, though they were uninclosed, so many as fifty persons were employed under cover, so as to form one trade establishment, the justices should have found the fact. But here they have found the contrary, and, as I understand the evidence, they were quite right in the conclusion they came to. The legislature had the subject before them in 1871, and they might then have amended the former acts, if the decision of this court in *Kent v. Astley* (1) did not carry out what they had intended should be the law.

Judgment for the respondents.

Attorney for appellant: *Solicitor to the Treasury.*

Attorneys for respondents: *Sandys & Trevenen, for Hayward, Rochester.*

(1) Law Rep., 5 Q. B., 19.

[Law Reports, 9 Queen's Bench, 367.]

May 1, 1874.

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*WALSH v. WALLEY and Another.

Master and Servant—Contract of Hiring—Notice to leave—Forfeiture of Wages due.

Plaintiff was a weaver employed by defendants as a weekly servant, his wages being regulated by the number of pieces which he wove and delivered to his masters. The wages of the defendants' workmen were ascertained and fixed at noon on Thursday in each week, but were not paid till the next Saturday. By rules embodied in the contract of hiring, the workmen were required to give, before leaving, fourteen days' notice at the time of booking-up on Thursday. "Persons leaving without notice will forfeit all wages due."

On a Thursday, the sum earned by the plaintiff in the preceding week, was ascertained and fixed at 15s. He commenced another week on the afternoon of the same day and worked during the morning of Friday, and earned 7s. He left during the forenoon of Friday without having given any notice:

Held, that the plaintiff forfeited, by leaving before the Saturday, the wages due on the Thursday, but not payable till the Saturday, as well as the wages earned between noon of Thursday and Friday morning.

CASE, on appeal from the County Court of Lancashire, holden at Blackburn.

Action to recover 22s. for wages alleged to be owing by the defendants to the plaintiff.

The following facts were admitted: The plaintiff was a weaver, in the employ of the defendants, who are cotton manufacturers, at Blackburn. He was a weekly servant, and his wages were regulated by the number of pieces which from time to time he wove and delivered to his masters. The practice at the defendants' mill was, that the wages earned by the workmen at the mill were ascertained and fixed at noon on Thursday in each week; but the wages so ascertained and fixed were not paid to the workmen entitled thereto until the succeeding Saturday. The workmen worked under certain rules, which were embodied in the contract of hiring between the masters and workmen. The rules are as follows: "All persons in our employ are required to give fourteen days' notice before leaving, such notice to be given at the time of booking-up. Fourteen days' notice will be given previous to discharging any person, except for spoiling or neglecting work, in which case they will be discharged forthwith. Persons leaving without notice will forfeit all wages due, and their return to work may be refused."

*The term "booking-up," in the above rules, is understood by the parties to mean the Thursday in each week. [368

The principal part of the wages sued for, namely, 15s., was earned by the plaintiff in the week of his service which ended at noon on Thursday, the 25th April, 1872; and such sum was ascertained and fixed at that time. The plaintiff commenced another week of his service on the afternoon of that day; he worked during that afternoon and also during the morning of Friday, the 26th of April, and he earned during that time, 7s., the residue of the 22s. sued for. He left the service on the forenoon of Friday, without having given any notice of his intention to leave.

His reason for so leaving, was an intended alteration in the weaving shed in which the plaintiff worked; but, for the purposes of this appeal only, it was admitted that the plaintiff left the service without any reasonable or justifiable cause.

The plaintiff applied for payment of his full wages, namely, 22s., on Saturday the 27th of April; but his application was refused altogether on the ground that his wages had been forfeited.

At the hearing, the same ground of defence to the action was taken. It was held by the judge, that, as the plaintiff had left the service after the commencement of the week beginning at noon on Thursday, the 25th of April, without proper notice of his intention to leave, the wages earned during that week were forfeited, and could not be recovered;

but that the wages earned in the previous week, and which were ascertained and fixed on Thursday, the 25th of April, were vested in the plaintiff, and were not divested or forfeited, either by the general law or by the special agreement contained in the rules, by the plaintiff leaving the service without notice in a subsequent week of his service. And a verdict for the 15s. was given accordingly.

The question for the opinion of the court was, whether the wages earned by the plaintiff in the week ending at noon on Thursday, the 25th of April, were forfeited by the plaintiff having left the service on Friday, the 26th of April, 1872, without having given notice of his intention to leave.

If the court was of opinion that such wages were so forfeited, the verdict was to be set aside and judgment for the defendants to be entered.

369] **R. G. Williams*, Q.C., for the defendants: The only wages "due" when the plaintiff left without notice, were the 15s. fixed on the Thursday, but not payable till the Saturday. The wages earned during the current week were forfeited by the general law; and by the special terms of the contract embodied in it in the form of rules, the wages due, but not payable, were forfeited. It is clear that the postponement of the payment was intended, together with the forfeiture clause, to give as much protection as possible to the masters. On any other construction, the words would be nugatory. [He referred to *Button v. Thompson* (').]

J. Edwards, for the plaintiff: The rule as to forfeiture was intended to prevent a break in the service between the booking-up days. The wages were not weekly, but by the piece.

[*LUSH, J.*: The postponement of the payment for two days after the wages are ascertained, seems to be on purpose to secure some motive in the servant for giving proper notice. On any other construction, if he left directly after the booking-up, without notice, he would forfeit nothing.]

COCKBURN, C.J.: The only reasonable construction of these rules is that contended for on the part of the defendants; otherwise a man could, as soon as the wages were fixed, at once leave on the Thursday without notice, and yet incur no forfeiture. The rules were clearly intended to protect the masters against this contingency. It has been argued that the clause of forfeiture was intended to prevent workmen leaving in the middle of the week; the answer to that argument is, that the wages of the current week would have been forfeited by the general law. The rules must

have been framed with a view to protect the masters against the possibility of the men working up to Thursday, and then leaving without any notice.

BLACKBURN, J.: I am of the same opinion. This is the case of a weekly hiring, the wages to be regulated and paid in each week according to the amount of work done; and the wages to be paid in each week are to be fixed and ascertained on the Thursday, but not to be paid till the Saturday. Then all wages "due" are to be forfeited if the workman leaves without notice. Here, the plaintiff *left without [370 notice, and the only wages "due" were those fixed on the Thursday, and he has therefore forfeited them by the express terms of the contract. I give no opinion as to what would have been the consequence if the masters had not paid the wages on the Saturday and the plaintiff had left on the Monday without notice.

LUSH, J.: I am of the same opinion. It is clear the rules were framed with the intention that any workman who leaves without notice shall forfeit something at whatever part of the week he leaves. That can only be carried out by his forfeiting all the wages that have not been paid when he leaves.

Judgment for the defendants.

Attorneys for both parties : *Doyle & Edwards.*

[Law Reports, 9 Queen's Bench, 380.]

April 25, 1874.

*PITTS, Appellant; MILLAR, Respondent. [380

Cruelty to Animals—12 & 18 Vict. c. 92, s. 3—Baiting Animals—Rabbits.

A match took place between the owners of two dogs as to which could kill the greatest number of rabbits by running after them. The match took place in a field containing an area of three acres, walled in so that the rabbits could not escape:

Held, That this was not baiting animals within the meaning of 12 & 18 Vict. c. 92, s. 3.

CASE stated by justices for the borough of Dewsbury, in the West Riding of the county of York, under 20 & 21 Vict. c. 43.

The appellant was charged on an information that he did unlawfully use a certain place, to wit, a field, for the purpose of baiting a certain animal, to wit, a rabbit, and did

then and there bait such rabbit, contrary to 12 & 13 Vict. c. 92, s. 3. (')

381] *At the hearing the following facts were proved :

On Saturday afternoon, the 12th of July, the respondent and two police sergeants went to a field at West Town, in Dewsbury, occupied by one Solomon Eastwood, and known as the Borough Park Grounds. A person was at the entrance of the grounds receiving money for admission. The grounds consist of a field containing an area of 3a. 3r. 15p., which is walled and paled round so that an animal such as a rabbit cannot escape therefrom. There were 400 to 500 men in the grounds, and a match took place for £25 a side between two dogs as to which could take the greatest number of rabbits by running after them ; the witness saw the appellant and other persons taking part ; a person had two dogs in a slip, and the appellant and another man had each hold of one of the dogs' tails ; a man took a live rabbit and shook it in front of the two dogs, and then took a rabbit and let it loose about sixty yards in front of the dogs, which were then slipped, and ran and killed the rabbit. This was done to about twenty rabbits, and the dog which killed the greater number of rabbits was the winner of the £25.

It was contended on behalf of the appellant, that this was not such a baiting of an animal as came within the section of the act of Parliament, and that a person who set a greyhound at a hare in a coursing match, or who put on the hounds in a fox covert, might just as well be charged with baiting the hare or fox.

The justices considered that those cases differed from the present, as the hare or fox might escape, but that in this case a rabbit could not possibly get away from the dogs, and that this was such a case of baiting an animal as s. 3 intended to meet ; and they convicted the appellant.

The question for the opinion of the court was, whether the above facts constituted an offence within 12 & 13 Vict. c. 92.

(') 12 & 13 Vict. c. 92, s. 3. " Every person who shall keep, or use, or act in the management of any place for the purpose of fighting or baiting any bull, bear, badger, dog, cock, or other kind of animal, whether of domestic or wild nature, or shall permit or suffer any place to be so used, shall be liable to a penalty not exceeding £5 for every day he shall so keep, or use, or act in the management of any such place or permit or suffer any place to be used as

aforesaid : Provided always, that every person who shall receive money for the admission of any other person to any place kept or used for any of the purposes aforesaid shall be deemed to be the keeper thereof ; and every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, bear, badger, dog, cock, or other animal as aforesaid, shall forfeit and pay a penalty not exceeding £5 for every such offence."

Sir J. B. Karlake, Q.C.: (*Forbes* with him), for the appellant: There are two questions: first, whether the field is "a place kept or used for the purpose of baiting" rabbits; and, secondly, whether hunting rabbits with dogs in the manner stated in the case is "baiting." With regard to the first point, this was not a place kept, that is, regularly kept, for the purpose of baiting animals. There ap- [382
pears to be only one user of this field, and there is no evidence that it was a place generally kept and used for the purpose of baiting animals: *Clark v. Hague* ('); *Morley v. Greenhalgh* ('); *Coyne v. Brady* (').

[*COCKBURN, C.J.*: If from a sudden and accidental circumstance a place was used once for the purpose of a bull-bait it might perhaps be said not to be within the section; but if a publican who has a yard gives notice that a bull will be baited in the yard, though the place is not always appropriated to that purpose, would it not be a place used for baiting a bull?]

It might be so were it not for the decisions.

[*QUAIN, J.*: The point was not made before the justices; we must assume it to be a place within the enactment.]

As to the second point, clearly the facts do not amount to baiting. In the first place, a rabbit is not an animal that can be baited—bulls, badgers, and rats being animals that by nature can defend themselves, can be baited; but in this case the object was to kill as many rabbits as speedily as possible, and to test the skill and fleetness of two dogs. The enactment does not apply to killing animals by chasing.

The respondent did not appear.

COCKBURN, C.J.: I am clearly of opinion that the pursuit of rabbits by dogs is not baiting animals. That term is usually applied when an animal is tied to a stake or confined so that it cannot escape.

QUAIN, J.: The facts stated do not amount to baiting, but to hunting rabbits. I find that in *Johnson's Dictionary* the word "bait" is said to mean "to attack with violence," or "to harass by the help of others; as we bait a boar with mastiffs, but a bull with bull-dogs." This conviction cannot be sustained.

Judgment for the appellant.

Attorneys for appellant: *Blakeley & Beswick, for Ibberson, Dewsbury.*

(1) 2 E. & E., 281; 29 L. J. (M.C.), 105.

(2) 8 B. & S., 374; 32 L. J. (M.C.), 98.

(3) 12 Ir. C. L., 577.

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Mellor v. Watkins.

[Law Reports, 9 Queen's Bench, 400.]

May 1, 1874.

400]

*MELLOR v. WATKINS.

Landlord and Tenant—Effect of Surrender of Lease on Interest of Sub-Lessee—Parol License, Revocation of—Rights of Licensees.

At Michaelmas, 1851, W., the owner of two adjoining houses, Nos. 4 and 5, let No. 5 to A., as tenant from year to year. Defendant having become tenant to W. of No. 4, A. let him the cellars under No. 5, from year to year from Michaelmas, 1851. There was in the front cellar a gas meter communicating with the house No. 5, and it was a term of the letting that A. should be allowed to go to the meter, if necessary, whenever defendant's premises were open. In July, 1871, it was agreed between A., W. and D., that A. should give up possession of No. 5 to W., and D. became tenant from year to year to W. from Michaelmas, 1871. Defendant was aware that No. 5 was given up by A., and relet to D., but no notice to quit the cellars was given to defendant. In March, 1872, D. put up in the cellars a water meter communicating with his house, without either objection or express permission of the defendant. Afterwards D. surrendered his interest in favor of the plaintiff, and W. let No. 5 expressly including the cellars, to the plaintiff for fourteen years, from the 24th of June, 1872. The plaintiff entered into occupation, the cellars remaining occupied by the defendant, and plaintiff, without objection or permission of the defendant, put up more pipes and some bell-wires in the cellars. In July, 1872, plaintiff demanded possession of the cellars, but defendant refused to give them up without a proper notice to quit, and he retained possession till April, 1873. On the 10th of January, 1873, the defendant cut off the plaintiff's water supply by hammering up the service pipes passing through the cellars, and cut the gas pipes and bell-wires. Plaintiff having brought an action for being kept out of possession of the cellars and for the damages caused by defendant's cutting the pipes, &c.:

Held, that defendant was entitled to keep possession until a proper notice to quit had been given; for that the voluntary surrender by A. could not affect the interest of the defendant, his sub-lessee.

Secondly, that plaintiff was entitled to damages for the cutting of his pipes and wires; for that a licensee, under a revocable license, was entitled to notice of revocation and a reasonable time afterwards to remove his goods.

Cornish v. Stubbs, (Law Rep., 5 C. P., 334), followed on the latter point.

CASE stated by an arbitrator under an order *at nisi prius*, without reference to the pleadings.

This was an action to recover damages from the defendant for keeping the plaintiff out of possession of the cellars of a house, No. 5, Holyrood Terrace, Malvern, and for damaging the gas-pipes, water-pipes and bell-wires of the said house, which passed through the same cellars.

In 1851, Joseph Williams, the owner of a row of houses, 401] Holyrood *Terrace, let the house No. 5 to Mr. James Allen, senior, as tenant from year to year, from the 29th of September, 1851, and Allen entered and continued in possession until the change of occupation hereafter mentioned.

In 1854 Messrs. Green, wine merchants, were occupying the adjoining house, No. 4, as tenants to Williams, and they applied to Allen to let them the back cellars under

No. 5, for the purposes of their business. Allen agreed to let them these cellars at £8 a year, and they accordingly took possession of them.

Allen retained possession of the front cellar, and about the same time that he let the back cellars to Messrs. Green, he put a five-light gas meter in the front cellar, with a service pipe therefrom to the part of the house which was used as a shop, but this pipe did not pass through any part of the back cellar, nor was the gas at that time conveyed to any other part of the house.

In 1861 Messrs. Green became bankrupt, and the defendant took over their business, and became tenant of No. 4 to Williams.

In the same year the defendant, having entered into possession of No. 4 and the back cellars of No. 5, applied to Allen to let him the front cellar under No. 5, in addition to the back cellars previously let to Messrs. Green; and thereupon it was agreed between him and Allen that he should become a yearly tenant of the whole of the cellars under No. 5, from Michaelmas, 1861, at the rent of £14 10s., it being a term of the letting that Allen should be allowed to go down to the meter and do anything that was required to the gas supply whenever defendant's premises were open.

Williams knew that the cellars were let to the defendant at the rent above mentioned, but had no further knowledge of the terms of the letting.

In 1866, Allen gave up the occupation of No. 5 to his son, James Allen, junior, but remained tenant of the house to Williams.

In June, 1871, James Allen, junior, failed, and filed a petition for the arrangement of his affairs by liquidation under the Bankruptcy Act, 1869. In July of that year, it was arranged between James Allen, senior, James Allen, junior, the trustee under the liquidation of James Allen, junior, Williams, the landlord, and *James Davis, that James [402 Allen, senior, and his son should give up the house to Williams, and that he should let it to Davis, who had also arranged to take the fixtures and furniture on the premises. In the same month possession of the house, and furniture, and fixtures, but not of the cellars, was given to Davis.

On the 23d of December, 1871, by agreement in writing, Williams let the house No. 5 to Davis as tenant from year to year, from Michaelmas day then last past.

The defendant was then aware that the house was given up by the Allens and relet to Davis; but no notice to quit the cellars was given him.

In March, 1872, Davis agreed to surrender his interest in favor of the plaintiff, and accordingly, in June of that year, he gave up his agreement to Williams to be cancelled, and the same was cancelled accordingly.

On the 1st of June, 1872, by deed of that date, Williams let the house No. 5, expressly including the cellars, to the plaintiff for the term of fourteen years from the 24th of June then instant.

At the time of the execution of this lease, the plaintiff knew that the defendant was in occupation of the cellars, but he did not know the terms on which he held them.

From the time of the failure of James Allen, junior, in June, 1871, the defendant paid no rent for the cellars to any one, not knowing who was, under the circumstances above detailed, legally entitled to receive the rent from him.

At some time during the occupation of James Allen, junior, a ten-light gas meter had been substituted for the five-light meter in the front cellars of No. 5, and gas supplied from it to other parts of the house by pipes passing through the back cellars. This was done without objection on the part of the defendant, but without his permission being asked or given.

In March, 1872, while Davis was in occupation of No. 5, a water meter was fixed in the front cellar by the order of Williams, with a service pipe passing therefrom to supply the house. This was also done without objection on the part of the defendant, but without his permission being asked or given.

On the 24th of June, 1872, the plaintiff entered into occupation of the whole of the house, No. 5, except the cellars 403] which were *occupied by the defendant, and put some additional pipes into the cellars, so as to convey an additional supply of gas from the gas meter to his house and shop. He also put up bell-wires, running through the cellars from the front to the back part of his premises above. This was also done without objection or permission on the part of the defendant.

On the 9th of July, 1872, the plaintiff gave notice to the defendant that he should require the immediate possession of the cellars from the defendant; but after some correspondence, the defendant refused to give up possession, alleging that he was entitled to retain possession until he received a proper notice to quit; and he did not give up possession until the 10th of April, 1873.

On the 10th of January, 1873, defendant cut off the plaintiff's water supply by hammering up the main service

pipe passing through the front cellar from the water meter to the house above. He at the same time cut off the plaintiff's supply of gas at the gas meter, and severed the bell-wires which ran through the cellars. The plaintiff was deprived of his gas and water supply, and of the use of the bells, for five days, at the end of which time the supply of gas was restored, and the supply of water partially restored, but the bell-wires remained unserviceable till the defendant gave up possession, on the 10th of April.

The questions for the opinion of the court were, first, was the plaintiff entitled as against the defendant to the possession of the cellars from the 29th of September, 1872? Second, was the plaintiff entitled to the use and benefit of the water service, gas service and bell-wires in the cellars on the 10th of January, 1873?

The arbitrator assessed the damages which the plaintiff has sustained by being kept out of possession of the cellars, at £45, the damages which he has sustained through the interference with his water supply, at £15, the damages which he has sustained through the interference with his supply of gas, at £3, and the damages which he has sustained through the interference with his bell-wires, at 40s.

Sir *H. James*, Q.C., for the plaintiff: It must be admitted that it has been decided that no voluntary act of a lessee in *surrendering, or otherwise putting an end to his [404] tenancy, can affect the interest of his under-tenant. And therefore a notice to quit was necessary to determine the defendant's tenancy of the cellars; but he appears to have had constructive if not actual notice to quit, in December, 1871, more than six months before the 29th of September, 1872. On the second point, although a license, unless by deed, is revocable at any time, still reasonable notice and time to remove the goods ought to be given. This principle was assumed in the judgment in *Wood v. Leadbitter*(¹).

Baylis, for the defendant: It is clear that the defendant was entitled to retain possession of the cellars, no notice having been given to him when the plaintiff took possession of the house, No. 5. On the second point, the defendant had a right to oust the plaintiff, who was a mere licensee by parol.

[BLACKBURN, J.: No doubt the license was revocable at any time; but the proposition contended for by Sir H. James is most reasonable. Surely there must be some case on the point. *Liggins v. Inge*(²) and *Wood v. Manley*(³) go some way towards supporting the plaintiff's contention.

(¹) 13 M. & W., 838.

(²) 7 Bing., 682.

(³) 11 Ad. & E., 84.

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Mellor v. Watkins.

LUSH, J.: The case of *Cornish v. Stubbs* (¹), seems directly in point.] [The learned judge then read the facts of that case and the judgment of Willes, J.]

COCKBURN, C.J.: On the first question, our judgment must be for the defendant, viz., that the voluntary surrender of Allen of his interest could not affect the defendant's underlease of the cellars. If Allen had continued lessee, the defendant's interest could not have been determined except by a notice to quit, and the surrender of Allen's lease leaves the defendant's underlease untouched. Sir H. James admitted that there had been no notice to quit, and, moreover, that Allen could not by giving notice to his landlord determine the underlease; but he argued that the defendant was aware of the surrender, and so in some way was affected with notice; but when the time came he refused to go out without a proper notice, and stood upon his rights. It is clear that when a person voluntarily surrenders his lease, 405] he cannot by *so doing put an end to an undertenancy created by himself; and therefore there must be judgment for the defendant on the first point, on the ground that an underlessee's rights cannot be put an end to by a voluntary surrender of his lessor's interest.

On the other point, principle, reason, and common sense alike require that, although a license may be revocable at any moment, the licensee should have a reasonable time for removing off the premises what he has been licensed to put upon them; and the judgment of the Court of Common Pleas in *Cornish v. Stubbs* (²), fully upholds that proposition; and on the rest of the case therefore there must be judgment for the plaintiff.

BLACKBURN, J.: I am of the same opinion. Allen had no power to derogate from his landlord's rights. Subject to those rights, he had a right to sub-let; and by doing that he could not prevent the landlord from giving a notice to quit *in invitum*, which would have determined both Allen's and the defendant's interest. But no voluntary act on the part of Allen, by which his own interest might be determined, could put an end to the interest which he had created in the defendant. Allen's tenancy was put an end to as far as he was concerned, as between him and Williams, by the voluntary surrender of his lease; but the defendant's tenancy in the cellars still remained, until determined by a proper notice to quit. No notice however had been given previous to the plaintiff's coming into possession, in July, 1872, and no subsequent notice could operate

(¹) Law Rep., 5 C. P., 334, 339.

(²) Ibid., 334.

till the end of the year of tenancy next after six months had elapsed. So that the defendant clearly had the right to possession as against the plaintiff on the 29th of September, 1872. Sir H. James said that the defendant had constructive notice; I confess I could not follow his argument, and he cited no case in support of his proposition.

On the other point, it seems but reasonable that the person giving the license, though revocable at any time, must give the licensee sufficient time to remove the articles from the premises; and, at all events, that he is bound to give the licensee reasonable notice; none whatever appears to have been given here. I am happy to find that this position has already been established by *the case of *Cor-* [406
nish v. Stubbs (1), in which the judgment of Willes, J., goes most fully into the principle, and is amply sufficient to govern the present case.

LUSH, J., concurred.

*Judgment for the defendant as to the possession
of the cellars; for the plaintiff, as to the rest.*

Attorney for plaintiff: *T. H. Smith.*

Attorneys for defendant: *Brook & Chapman.*

(1) Law Rep., 5 C. P., 334, 339.

In this country it seems to be settled that one giving a license for the enjoyment of an easement upon his land, may revoke it at any time, without compensating the licensee for money expended in consequence of the license: *Babcock v. Utter*, 1 Abb. Ct. App., Dec. 27, S. C. less fully and correctly, 1 Keyes, 115, 397; *Fryer v. Warno*, 29 Wisconsin, 511; *French v. Owen*, 2 Id., 250; *Clute v. Carr*, 20 Id., 531; *Cocker v. Cooper*, 1 Crompt., Mees. and Roscoe, 418; see in Equity, *Bankhart v. Tenant*, L. R. 10 Eq., 141; *Jackson v. Oator*, 5 Vesey, 688.

A person encroaching upon the land of another by the overlapping of a wall, cannot resist the claim of the latter on the mere ground that the owner was silent during the progress of the encroaching structure. Standing by and suffering an adjoining owner to build on one's own land, is not sufficient to pass the title; and the owner is not estopped, by his silence, from setting up his title and recovering the possession. Such a mere acquiescence without re-

monstrance, is not sufficient to create an estoppel. Nor can an estoppel be created by the acts, or the silence, of an owner, where a party encroaching upon his land knew of the owner's title by the latter having actually derived it from the trespasser: *Christianson v. Linford*, 8 Robertson, 215.

In Iowa it has been held that "If a person, without objection, suffers one claiming title to land to enter thereon and expend money in making improvements, he will be thereby estopped from subsequently asserting his own title: *Bullis v. Noble*, 36 Iowa, 618; *Lucas v. Hart*, 5 Iowa, 415; *Poster v. Bigelow*, 24 Iowa, 379. And the plea that he had forgotten that his deed or title covered the lot in controversy, will not avail to prevent the estoppel: *Bullis v. Noble*, 36 Iowa, 618. It is undoubtedly true that one who from forgetfulness does an affirmative act, which results in an injury to another, will be estopped thereby from alleging such forgetfulness as a defence to the effect of such act, (*Slim v. Croncher*,

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1 De Gex, Fisher and Jones, 518, and authorities cited in Mr. Perkins's note to Am. ed.), but we doubt the application of the rule to mere *silence* or *inaction*. The law, it seems to us, very properly requires every man to pay sufficient attention to what he *does*, that he shall not mislead another, but

it is not so unreasonable as to require him to maintain a constant watchfulness over others, lest they may be encroaching upon *his* rights, for the same rule which requires him not to do an act to his neighbor's prejudice binds his neighbor to do nothing to *his*.

[Law Reports, 9 Queen's Bench, 409.]

May 8, 1874.

409] *OLIVER v. THE NORTH EASTERN RAILWAY COMPANY.

Railway Company, Liability of, for Improper State of Level Crossing.

Where a railway company construct their line across a highway on a level under the sanction of an act of Parliament, it is their duty to keep the crossing in a proper state for the passage of carriages across the rails; and if a carriage is damaged in consequence of the rails being too high above the surface of the roadway, the company are liable.

DECLARATION, that defendants were possessed of a railway which crosses at a level a highway, and defendants had the management and control of the railway at such level crossing; and it was the duty of defendants to keep the rails in such a state that all persons lawfully using the highway might do so with safety to themselves and their carriages, yet defendants so improperly and unskilfully conducted themselves in that behalf that the rails became in an unfit condition and dangerous to persons using the highway with carriages; and plaintiff's carriage, which he was driving in the highway and across the railway, was greatly damaged.

There was a second count laying the duty of defendants to keep the rails and soil of the road in a proper condition, and that defendants left the rails too high above the surface of the road.

Pleas: 1. Not guilty.

2. That the acts complained of were lawfully done by defendants under 5 Vict. sess. 2, c. xxviii. (Stanhope and Tyne Ry. Act); 21 & 22 Vict. c. cxvi. (Stockton and Darlington Ry., &c.); and 26 & 27 Vict. c. cxxii. (North Eastern and Stockton Ry., &c.)

Issue joined.

At the trial before Pollock, B., at the Durham Spring Assizes, 1873, it appeared that the plaintiff was driving a four-wheeled dog-cart along the highway at Carrhouse, where the Stanhope and Tyne Railway (which belongs to the defendants) crosses the highway on a level; and, according to

the plaintiff's evidence, in consequence of the rails being too high above the level of the road, the hind wheels of the cart were caught by the rails, and the carriage was torn in two. It appeared that the level crossing *had been con- [410] structed before any of the defendants' special acts of Parliament were passed, but this part of the railway was expressly mentioned in the acts; and it was contended, on behalf of the defendants, that they were in the same position as if the level crossing had been originally constructed under the express sanction of an act of Parliament, and that no duty was imposed on a railway company to keep in repair a public highway; but the judge expressing an opinion against the contention, witnesses were called on behalf of defendants who spoke to the level crossing being in a proper state.

The learned judge told the jury that, as to the duty of the railway company with regard to the rails at the level crossing, they must consider the case as if the company had had the express sanction of an act of Parliament to put the rails there. In such a case the company would have power to put down such rails as are necessary for the purposes of the line; but the rails must be laid and kept so as to cause as little injury or danger as possible.

The jury found a verdict for the plaintiff for £20.

A rule was obtained for a new trial on the ground of misdirection in telling the jury that defendants were under an obligation to repair and keep in repair the roadway of the level crossing.

C. Russell, Q.C., and *J. Edge* showed cause: The defendants were not in the same position as if they had had the express sanction of an act of Parliament previous to the making of the level crossing: *North Eastern Ry. Co. v. Leadgate Local Board* (*). But assuming that the defendants were in the same position, still the sanction of the legislature only authorized the doing of the act without negligence.

[BLACKBURN, J.: In *Rex v. Kerrison* (*) it was held that where persons were authorized by statute to create what would otherwise amount to an indictable nuisance, such as making cuts across a highway, they were bound without any express enactment to put and keep up for the public a proper substitute for the old way, such as a bridge. The principle of that case is expressly in point.]

Reg. v. Ely (*) adopts the principle of that case, and the *principle is fully enunciated in the judgment of the [411]

(*) Law Rep., 5 Q. B., 157.

(*) 15 Q. B., 827; 19 L. J. (M.C.), 223.

(*) 3 M. & S., 526.

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court ('). The same principle had been acted upon in the previous case of *Rex v. Lindsey* ('). [They also referred to *Wyatt v. Great Western Ry. Co.* ('); *Leech v. North Staffordshire Ry. Co.* ('), and the notes to *Rex v. Stoughton* (').]

Holker, S.G., (*Waddy, Q.C.*, with him), in support of the rule: The liability of a railway company, where they are authorized to make their line across a highway on a level, is measured by the duty imposed in s. 47 of the Railways Clauses Consolidation Act (8 Vict. c. 18), viz., to erect gates and keep them closed except for the passage of carriages, &c.; and, this duty being expressly imposed, no further duty or liability can be inferred. *Rex v. Kerrison* (') is inconsistent with *Rex v. Kent* ('), where it was held that the county, and not the person who had erected a bridge, was bound to keep it in repair. So, here, the company having laid down the rails, it was the duty of the surveyor of highways to see that the roadway was kept up to the level of the rails; and if this is not done, the company are not to be held responsible.

COCKBURN, C.J.: The principle of the case of *Rex v. Kerrison* ('), and the other cases cited, clearly applies to this case.

PER CURIAM (Cockburn, C.J., Blackburn, Lush and Quain, JJ.):

Rule discharged.

Attorney for plaintiff: *J. Tucker.*

Attorneys for defendants: *Doyle & Edwards, for Nixon, Barnard Castle.*

(¹) 15 Q. B., at pp. 843-844; 19 L. J. (M.C.), at p. 232.

(²) 14 East, 317.

(³) 6 B. & S., 709; 34 L. J. (Q.B.) 204.

(⁴) 29 L. J. (M.C.), 150.

(⁵) 3 Wms. Saund., 157.

(⁶) 3 M. & S., 526.

(⁷) 2 M. & S., 518.

[Law Reports, 9 Queen's Bench, 418.]

May 9, 1874.

IN THE EXCHEQUER CHAMBER.

418] *FISHER and Others v. THE LIVERPOOL MARINE INSURANCE COMPANY (').

Marine Insurance—"Slip"—Policy—30 Vict. c. 23, ss. 7, 9.

The defendants, a Liverpool insurance company, employed the firm of E. & Co. as their agents in London. The plaintiffs instructed P. & Co. to insure for them steel rails, and P. & Co. prepared a slip, which was initialed by E. & Co. on behalf of the defendants. According to the course of business observed by the defendants' com-

(¹) Affirming 7 Eng. Rep., 82.

pany, P. & Co., sent a copy of the slip to E. & Co., who the same night sent it to the defendants at Liverpool. P. & Co. paid to E. & Co. the premium due on the policy and the amount due for the stamp duty. The steel rails were afterwards totally lost by the perils intended to be insured against, and the defendants then refused to execute any stamped policy:

Held, affirming the judgment of the court below, that no action would lie; for that the initialing of the slip and forwarding the copy slip to the defendants were parts of one contract; and that no further contract could be implied to execute a stamped policy within a reasonable time after the copy slip was transmitted to the defendants; and as no stamped policy had been executed, 30 Vict. c. 28, ss. 7 and 9 prevented the plaintiff from maintaining an action.

APPEAL from the decision of the Court of Queen's Bench making absolute a rule to enter a verdict for the defendants⁽¹⁾.

First count upon a contract that the defendants had warranted that one Eames was their agent in London, authorized to accept *risks and to receive premiums on their [419 behalf, and that the plaintiffs were thereby induced to insure and to pay premiums on the cargo of the ship *Lizzie*, and not to insure elsewhere, and setting out as breach that Eames was not so authorized, and averring loss and damage.

Second count charged a fraudulent misrepresentation by the defendants that Eames was their agent and authorized as in the first count mentioned, whereby the plaintiffs were induced to insure the cargo of the *Lizzie* and pay to the defendants a sum of money for premiums and stamp duty on such insurance, and alleging as breach that Eames was not so authorized, and that no policy was granted, and averring a total loss by perils of the sea.

Pleas. To first count, a traverse of the warranty. To second count, not guilty; and that the defendants did not induce the plaintiffs to insure as alleged.

1. The plaintiffs carry on business as merchants and ship-owners at Barrow-in-Furness, and were the owners of the ship *Lizzie*, and continued to be such owners at the time of the loss of the ship. The defendants are a marine insurance company carrying on business at Liverpool under the style of the Liverpool Marine Insurance Company, Limited, and in December, 1871, they entered into a voluntary liquidation.

2. The defendants appointed and employed Eames & Co. to act as their agents in London, to accept risks and receive premiums in London on their behalf, and a circular was issued by the defendants, informing the public of the appointment.

3. Eames was called as a witness by the plaintiffs, and proved the course of business to be as follows: The firm ac-

(1) Law Rep., 8 Q. B., 469.

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cepted risks for the defendants by Eames himself initialing the slips. Copies of such were then sent to him by the brokers, and he invariably forwarded copies of the same to the defendants at Liverpool on the same day.

4. The plaintiffs employed their brokers in London, Patton & Co., to insure for them a cargo of steel rails per the ship Lizzie.

5. The cargo was the property of the Barrow Hematite Company, as agents for whom the plaintiffs were shipping the cargo, and the Lizzie being the plaintiffs' own vessel, they were carrying the cargo upon a charterparty, and took 420] upon themselves the risk of *the cargo, and to pay the Hematite Company any loss thereon. After the loss, the plaintiffs paid the Hematite Company the amount thereof.

6. On the 16th of November, 1871, the brokers submitted a slip, of which the following is a copy, to Eames, who initialed the same. The parts in italics are in print in the slip :

£4,923 4s. 5d. "Cash." 16 Nov., 1871.

"John Patton, Junr., & Co.

"Lizzey.

"Barrow

"Steel Rails

"f g a

"f c & s

New York

f p a

880

£6,000 } 60%

"£1,000 T. R. E. 16/11."

7. The initials T. R. E. appearing opposite the sum of £1,000 on the slip, are the initials of Eames, and the slip was put in and proved at the trial, and was not objected to.

8. A copy of the slip or request note was made by the brokers, and sent to Eames, and he the same day forwarded to the defendants a document, of which the following is a copy :

[See next page.]

OPEN.

LIVERPOOL MARINE INSURANCE COMPANY, LIMITED, LONDON AGENCY,
LONDON, 16/11/1874. No.

Policy in the name of	On	Voyage including all risks of craft, free of captures and seizures, and the consequences of any attempt thereat.	Sum Insured.	Premium per cent.	£	s.	d.
John Patton, junr., & Co.	Steel rails						
	f p a f g a f C & S	At and from Barrow to New York	£1,000	60/ Brokerage			
To the debt of Do.	Ship. Lizzy			Discount Duty . . £			
	Date of Sailing.						

*9. On the 1st or 2d of February, a debit note was [421 forwarded from Eames, to Patton & Company, of which the following is a copy :

"The Liverpool Marine Insurance Company, Limited, London Agency, Eames & Co., St. Michael's House, Cornhill, E. C.

"To premiums for the month of January, /72,

less brokerage, and 10% discount for cash . £25 13 0

"Policy duty 0 2 6

"Messrs. J. Patton, Junr., & Co.

£25 15 6

"Note.—The discount will be forfeited in default of prompt payment on the 8th February."

10. On the 29th of January, 1872, the defendants' liquidators in Liverpool wrote a letter to Eames & Co., of which the following is a copy :

"We have open slips as at foot, and shall be glad to receive instructions regarding them.—J. S. McGhie.

"Nov. 16th, Lizzie, Barrow to New York, £1,000 on steel rails. J. Patton, Jun., & Co."

11. To this letter Eames & Co. sent no reply, but upon receipt of it communicated with Patton & Co. and received their instructions to put the slip forward. The slip was put

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forward, but on what date did not appear, except by the correspondence.

12. On the 13th of March, 1872, Patton & Co. paid to Eames & Co., by check to the defendants' order, the sum of £25 15s. 6d., being £25 13s. for premium and 2s. 6d. for stamp duty on the policy, and Eames & Co., acting on their authority, indorsed the check for the defendants and paid it into their own banking account, and it was duly paid.

13. The brokers on that occasion, and on several occasions afterwards, applied to Eames for the policy, and were told it had not been sent up from Liverpool, and that he would write a sharp letter about it.

14. The Lizzie and cargo were, on the 21st of March, 1872, posted as, and were in fact, totally lost, and the defendants refused to execute any stamped policy or to pay the insurance.

422] *The following correspondence took place between Eames & Co. and the defendants' liquidators: Eames to McGhie, 13th of March, 1872: "Patton & Co. have applied to us for policy per Lizzie, the slip of which was sent to you some time since. Please send us the policy at your earliest convenience."

Eames to McGhie, 20th of March, 1872. "Copy of yours of 29 Jan. to hand. We have never received the original. The Lizzie was sent down to you to put forward some ten days ago, and we have since written asking for policy."

McGhie to Eames, 21st of March, 1872; "As so long a time has elapsed since the insurance per the Lizzie was opened, we cannot now issue a policy."

Eames to McGhie, 26th of March, 1872: "Referring to your note in reference to the Lizzie, we are surprised at your refusing to issue a policy. This slip was sent to you some time since, and we have written more than once for the policy; and, moreover, Patton & Co. have paid the premium."

McGhie to Eames, 26th of March, 1872: "Will you say when you received the premium for this vessel, as we have no account of it? The earliest request we have for a policy was contained in your letter of the 13 March."

Eames to McGhie, 27th of March, 1872: "The copy of the slip was sent to you some time since; we have no record of the date, because it was sent down without any letter being written (as customary). The check was paid the 13th March. Patton & Co. inform us that they wish to know by wire to-morrow without fail, if you intend to issue a policy or not."

McGhie to Eames, 28th of March, 1872: "I have yours of yesterday, and repeat, a policy cannot now be issued. The liquidators do not recognize the payment to you by Patton & Co., as you had no authority to receive it on behalf of this company. Permit me to ask why advice of the payment was not made to the liquidators before?"

Eames to McGhie, 28th of March, 1872: "Never having had our authority to receive money on behalf of the Liverpool Marine cancelled, we of course considered we were justified in applying for and receiving premiums over due; and referring to your other question, it has not been our custom, as you well know, to make *daily advice of payments [423 made to us on behalf of the company. Patton & Co. inform us that they consider you are bound to issue a policy."

16. The company did not at any time return the slip, nor did they in any way intimate that they would not grant a policy until the 21st of March, 1872.

17. The learned judge put the following questions to the jury: 1st. Did the defendants authorize Eames to initial slips, to accept risks, and to receive premiums on their behalf? 2d. Did the defendants, by approving the circular issued, stating that Eames had authority to accept risks, give the plaintiffs reasonable ground to believe, and did the plaintiffs believe, that if they paid the premium and stamp duty on a slip initialed by Eames, the defendants would issue a policy in accordance with the slip? 3d. Were the plaintiffs prevented, by the conduct of the defendants, from insuring elsewhere? The jury having answered all these questions in the affirmative, a verdict was thereupon entered for the plaintiffs, with damages £1,000; the declaration to be taken as amended to meet the facts and findings; the judge ruling that there was no evidence on the record as it stood, and reserving leave to the defendants to move to enter a verdict for them, or a nonsuit on the grounds that there was no evidence to go to the jury of liability on the part of the defendants, and that the judge ought not to have allowed the declaration to be amended.

A rule having been obtained accordingly, the majority of the Court of Queen's Bench, Quain and Archibald, JJ., (Blackburn, J., dissenting) made the rule absolute (').

Benjamin, Q.C., (*Aspland* with him), for the plaintiffs: It must be admitted that the slip being a contract for marine insurance is void by reason of 30 Vict. c. 23, ss. 7 & 9, and no action can be brought on the slip. The course of business adopted by a private underwriter and that followed by

(') Law Rep., 8 Q. B., 469.

insurance companies is recognized in the judgments of the judges in the court below. In the first case the broker prepares the policy and tenders it to the underwriter for execution, and in the latter the copy slip is sent to the insurance company, who then prepare the policy themselves; on 424] *receipt of the copy slip a duty devolved on defendants to prepare a policy or to inform the plaintiffs within a reasonable time that they refused to do so; an action will lie for a breach of this duty. The defendants have not performed either of these alternatives, and the plaintiffs have been unable to effect another insurance; they are, therefore, entitled to recover to the extent that they are damnified by the misconduct of the defendants. Secondly, paragraphs 10 and 11 show, subsequently to the initialing of the slip, that the defendants entered into a fresh contract "to put forward the slip," that is, to prepare and execute a policy; and paragraph 12 shows that the plaintiffs' brokers paid both the premium and the stamp duty; if, therefore, there was no contract on receipt of the copy slip by the defendants, which created a duty to prepare a policy, these paragraphs and the correspondence show a subsequent contract in February to prepare and execute a policy.

R. G. Williams, Q.C. (Aspinall, Q.C., with him), for the defendants, was not heard.

LORD COLERIDGE, C.J.: I am of opinion that the judgment of the court below must be affirmed, on the short ground, that the initialing of the slip and the sending of that slip by Eames to the defendants, and its receipt by them, and all that ought to have been done in consequence of initialing the slip, constituted one entire and indivisible contract between the plaintiffs and the defendants, the defendants being represented by their agent Eames. If that be so, the contract is one not capable of being enforced; it is a contract made by a slip, and the slip is, as has been laid down in several cases, a contract for marine insurance, and by the express words of 30 Vict. c. 23, such a contract is made absolutely void and incapable of being enforced. Although it is a contract incapable of being enforced in a court of law, I agree that it is a contract binding in honor. The way in which this contract was attempted to be enforced at law was by making what really was one contract into two contracts, by saying that the contract contained in the slip and of which the slip was the evidence was one contract, and that that contract could not be enforced; and that, apart from the contract contained in the slip, there was an obligation on the defendants to prepare 425] a policy and tender it to themselves for *execu-

tion, and that such obligation arose impliedly from the state of the facts between the plaintiffs and the defendants; that this contract was enforceable, and that the plaintiffs could recover in this action, not the amount which was covered by the slip, but damages for its non-fulfilment. When a broker, on behalf of an insurance company, initials a slip, he does nothing more than any other person entering into a contract does who is to prepare and execute something as part of the contract he makes; whether it is a policy to be prepared and executed according to the terms of the slip, or a deed to be executed according to the terms of an agreement, it is one and the same transaction. I agree in opinion with the majority of the court below, that in the present case there was only one contract. It is argued that there was a subsequent contract between the parties; but I think that the whole transaction must be regarded as a performance or non-performance of the original contract entered into when the slip was initialed; it is impossible to distinguish this day or that day as being the date of any fresh or second contract; the whole transaction is one, an entire and indivisible contract; and in my opinion, that one entire and indivisible contract cannot be enforced. The judgment of the Court of Queen's Bench must be affirmed upon the grounds stated in the judgment of the majority of the court.

BRAMWELL, B.: I am of the same opinion. It is said that in this case there are two contracts: one not enforceable by reason of the statute, but the other enforceable. The argument is ingenious, but there is no foundation for it: there are not two contracts. When the practice of insurance companies is borne in mind, the fact that the defendants, or Eames on their behalf, initialed the slip, is nothing more than that the plaintiffs are bound to pay the premium and the stamp upon the policy; and the defendants are bound to receive the premium and to prepare a policy properly stamped, and to pay the loss if there be one. The whole transaction was arranged between the parties at the time of initialing the slip, and there was no necessity for any further arrangement or bargain. The preparation of the policy was part of the original bargain. Nothing afterwards happened which was not in contemplation between the parties when the initialing of the slip took place. There is no [426 ground for likening the defendants to the broker in the case of an insurance with a private underwriter: they are not paid for preparing the policy, and they have no duty in reference to the preparation of the policy, except that which they undertook at the time the slip was initialed. If it were

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not for the 30 Vict. c. 23, which makes the contract void for want of a stamp, no one would say that there were two contracts. If the argument is good for anything, there are many cases in which it could be said that there are two contracts: Take the case of a sale of real property; it is the duty of the vendee to prepare the conveyance. If an action could not be brought on the contract of sale, it could be said an action would lie for not preparing the conveyance. Take also the case of the sale of goods: one of the parties might undertake to put the contract into writing, and afterwards not do so. No action would lie for not selling or delivering the goods, or paying for them, as the case might be; but an action could be brought against him for not preparing an agreement or memorandum in writing. It is obvious that this could not be. There is, I think, only one contract, and the judgment of the Court of Queen's Bench must be affirmed.

BRETT, J.: If I had not tried this cause, I should not have added anything. At the trial I was convinced on the evidence that the defendants had entered into an agreement which, though not legally binding, was in every sense binding in honor, and that agreement had been shamefully repudiated; and I confess I sought means by which, if it were possible, without infringing upon the rules of law, to render that repudiation a failure. It is admitted that if this was an ordinary Lloyd's slip, the only undertaking which is to be inferred from the initialing of the slip is an undertaking to execute a policy of insurance. When an underwriter at Lloyd's initials a slip, it is clear that he does not undertake to prepare a policy, but to execute a policy when it is tendered to him; and as a slip is a contract having reference to a marine insurance, it is within 30 Vict. c. 23, and void if it be not stamped. It seems to me that the initialing of the slip was the only evidence at the time of any contract for marine insurance made by the defendants; there was no 427] other evidence of any such *contract. But it has been argued that at the time of the initialing of the slip, by reason of the course of business which is carried on by insurance companies, and which is different from the course of business carried on by the underwriters at Lloyds, there was at that time, and by reason of initialing the slip, another and independent contract, namely, that the defendants, besides executing a policy, would prepare a policy, and would procure a stamp for that policy; but if that be a contract made at the same time by reason of that course of business, it only is a contract because the defendants have initialed the

slip, and it is therefore a part of the same contract, and, if so, it cannot be so enforced any more than the contract to execute a policy: if, by initialing the slip and by the course of business, there is not only a contract on the part of the company to execute the policy, but to prepare the policy and to procure the stamp, it cannot be said there are two contracts evidenced by the same act, but one entire contract. It is said that there is evidence of a subsequent contract that the defendants would get the policy executed. In the first place, there is no evidence that Eames was the agent of the defendants to enter into such a contract; he was merely an agent to bind the defendants by initialing the slips. But this point was never made at the trial, nor was the question left by me to the jury, nor did I reserve leave to enter a verdict on this point, nor does the judgment of my Brother Blackburn proceed on this ground. I think the judgment of the court below was right, and ought to be affirmed.

CLEASBY, POLLOCK and AMPHLETT, BB., and DENMAN, J., concurred.

Judgment affirmed.

Attorney for plaintiffs: *J. McDiarmid.*

Attorneys for defendants: *Venn & Son.*

Although an action at law may not lie upon a parol agreement to complete an insurance by executing a proper policy of insurance, yet if a proper case be made therefor an agreement to do so will be enforced in equity: *Bidwell v. Astor Ins. Co.*, 16 N. Y., 263; *Rockwell v. Hartford, etc.*, 4 Abb. Prac., 179; *Whitaker v. Farmer's, etc.*, 29 Barb., 312; *Constant v. Allegheny Ins. Co.*, 1 Am. Law Reg., N. S., 116, and authorities cited by Mr. Wharton in note page 121, S. C., 3 Wallace, Jr., 313; *Audubon v. Excelsior, etc.*, 27 N. Y., 216; 3 Pars. on Cont., 6th ed., 374; 1 Sto. Eq., § 722.

And judgment may be given in the same action for the damages from loss of the property insured: *Bidwell v. Astor Ins. Co.*, 16 N. Y., 263; *Thomas v. Murray*, 32 N. Y. Rep., 611; *Rockwell v. Hartford, etc.*, 4 Abb., 179.

But if concealing the fact of loss the insured obtain a policy of insurance, dated back to the time of an alleged agreement to insure, it has been held that parol proof was not admissible to show that the contract of insurance was actually made before the loss occurred, though executed and delivered, and paid

for afterward; for that to allow such proof would be to contradict and vary the terms of the policy in a matter material to the contract: *Ins. Co. v. Lyman*, 15 Wall., 664.

It may perhaps very pertinently be asked, why one who has contracted for an insurance, and who perhaps to avoid litigation obtained his policy of insurance pursuant to such agreement, should not be allowed, after he had obtained it, to give the same evidence to maintain it which he would be allowed to give in an action to compel its execution. We are also unable to understand why evidence showing that an executed, written policy, ante-dated to the day of the alleged oral agreement, is contradicted, in its terms, by evidence of such oral agreement. It seems to us such evidence upholds and sustains rather than contradicts it.

As to what was not satisfactory evidence of an alleged oral agreement to insure, the case may however be consulted with advantage, and upon that ground it was undoubtedly very justly determined.

But a collateral agreement not within the scope of the agent's authority, as

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an agreement that other companies are solvent, will not be enforced : *Constant v. Ins. Co.*, 1 Am. Law. Reg., N. S., 116, S. C. 8 Wallace, Jr., 813.

Nor if the parties contract under a mutual mistake as to the terms of the proposed agreement, will a policy issued and delivered be reformed. In such case, however, if the plaintiff bring his cause

to trial as an equity suit and fail in procuring the desired reformation, he ought to be allowed to recover for a loss under the policy as it was drawn : *New York Ice, etc., v. North Western Ins. Co.*, 81 Barb., 72, as corrected by same case on appeal, 23 N. Y., 357 ; *McKeon v. See*, 4 Robertson, 465.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

TRINITY TERM, XXXVII VICTORIA.

[Law Reports, 9 Queen's Bench, 428.]

May 23, 1874.

*HEYWOOD and Others v. PICKERING. [428]

*Bill of Exchange—Check—Presentment for Payment—Payment by Check—
Custom of Bankers.*

A. in London drew a check on B. & Co., bankers at Jersey, in favor of C., on the 27th of January, and C. handed it to a London bank on the 28th, who, having no agent at Jersey, the same day sent the check by post direct to B. & Co. demanding payment. The check in due course of post would have arrived at Jersey on the 29th. B. & Co. stopped payment on the 4th of February, and on the 7th of February returned the check marked "refer to drawer." By the custom of London bankers, when a foreign check is paid to a banker by a customer, if the banker has no agent at the place where the check is payable, he sends the check direct to the banker on whom it was drawn demanding payment, and the banker immediately either remits the money or returns the check; checks drawn on bankers in Jersey are considered foreign checks:

Held, that there was a due presentment for payment of the check according to the custom of bankers; and that C. had been guilty of no laches so as to make the check his own.

DECLARATION for goods sold and delivered.

Plea: Payment before action. Issue thereon.

At the trial before Pigott, B., at the Middlesex sittings during Easter Term, 1873, it was proved that the plaintiffs sold to the defendant 100 gallons of copal oil, and received in payment a check of the defendant for £75. The check was dated the 27th *of January, 1873, drawn by the [429 defendant on Le Bailly, Deslandes & Co., Jersey Mercantile

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Union Bank, and was payable to the plaintiffs or their order. The check was unstamped, and was drawn in the city of London, but it did not specify the place where it was drawn. The plaintiffs received the check at half-past three in the afternoon of the 27th of January, 1873, and the next day paid it to their account at their bankers, the London and Westminster Bank, who, having no agent at Jersey, by that night's post forwarded the check to the Jersey bank demanding payment. The check in due course of post would arrive at Jersey about the middle of the day on the 29th, and the London and Westminster Bank ought to have received a remittance from the Jersey bank on the 31st at the latest. They received no remittance, but on the 7th of February the check was returned in an envelope without any letter, with the words "refer to drawer" written across it. The Jersey bank stopped payment on the 4th of February; the defendant had sufficient funds at the bank at the time of its stoppage to pay the check. By the custom of London bankers, a banker, when a foreign check is paid to him by a customer, if he has an agent at the place where the check is payable, sends the check to the agent to be presented for payment; but if he has no agent at such place, he sends the check direct to the banker on whom it is drawn; and the banker on whom the check is drawn immediately either remits the money or returns the check. Checks drawn on bankers at Jersey are considered to be foreign checks.

It was objected, on behalf of the defendant, that there was no proof of a proper presentment of the check at the Jersey bank. The learned judge nonsuited the plaintiffs, giving them leave to move to enter a verdict, the court to draw inferences of facts.

A rule was accordingly obtained to enter a verdict for the plaintiffs for £75 on the ground that the check being unstamped was invalid, and not admissible in evidence on the plea of payment (1), and also that the check was not taken in satisfaction, and not being paid, the plaintiffs were entitled to recover on the count for goods sold and delivered. 430] **M'Intyre*, Q.C., showed cause: Assuming the check to be in evidence, does the giving of it to the plaintiffs under all the circumstances operate as a satisfaction of the debt? *Prima facie* a payment by check is a conditional payment, but if the holder of the check by his conduct makes the check his own, then the payment becomes absolute and the drawer is discharged. The plaintiffs have been

(1) The second ground disposed of the case, and it became unnecessary to decide the first point.

guilty of laches in not presenting the check at the Jersey bank in proper time. They paid the check to their bankers, the London and Westminster Bank, on the 28th of January, who sent it direct to the Jersey bank; they received it on the 29th, and the London and Westminster Bank ought to have received a remittance at latest on the 31st. On not receiving the remittance they ought immediately to have written to the Jersey bank to send a remittance or return the check. The check was not returned till the 7th of February.

[BLACKBURN, J.: We have to draw inferences of fact: We may infer that the London and Westminster Bank wrote to the Jersey bank on the 31st of January, and the check was in consequence returned on the 7th of February.]

The return of the check on the 7th of February was too late to enable the plaintiffs to give the defendant notice of dishonor. Assuming that the check was duly presented on the 29th of January, it would be too late to give a notice of dishonor on the 7th of February.

[BLACKBURN, J.: That point was not made at the trial, and is not reserved.]

W. A. Clark in support of the rule: The plaintiffs received the check as conditional payment only; they have been guilty of no laches in presenting the check; it was duly presented and dishonored, and there is, therefore, no discharge of the debt. The plaintiffs received the check on the 27th of January; they paid it to their bankers on the 28th, the bankers the same day forwarded it to the Jersey bank, who received it on the 29th of January; on that day the check was duly presented for payment: *Hare v. Henty* (1); *Prideaux v. Criddle* (2). The evidence is, that by the custom of bankers, where a London banker has no agent at the place where the check is payable, the practice is to send the check to the banker on whom it is drawn; presentment by post *coupled with this practice is a due presentment of the check: *Bailey v. Bodenham* (3). The Jersey bank were the agents of the drawer, they were not the agents of the plaintiffs. What in effect the plaintiffs did was to ask payment of the person who the defendant says is his agent to pay the money for which the check is drawn. If there is any laches on the part of the Jersey bank in not returning the check, it is the laches not of the plaintiffs but of the defendant's agent. The plaintiffs presented the check according to the custom of bankers, requesting a remittance—that is due presentment.

(1) 10 C. B. (N.S.), 65; 30 L. J. (C.P.), 802.

(2) 16 C. B. (N.S.), 288; 33 L. J. (C.P.), 253.

(3) Law Rep., 4 Q. B., 455.

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BLACKBURN, J.: I think that the rule must be made absolute. It is clear law that a payment by check is *prima facie* only a conditional payment. It does not operate as a payment unless the check is paid, or the holder by his conduct makes the check his own; it is then equivalent to absolute payment. In the present case the question is, has there been such laches in dealing with the check on the part of the plaintiffs as to discharge the defendant? The plaintiffs received the check on the 27th of January, there was no undue delay in paying it to their bankers on the 28th; then on that day the bankers followed a course which is usual with London bankers, they sent the check to the Jersey bank by post, and required them to remit the amount to them. If the Jersey bank had remitted the money all would have been right; they, however did not do so. On the facts and the inferences I draw, I think that there was a due presentment for payment of the check on the 29th January; and then, before the bank stopped, there was an actual dishonor of the check, so that there was no payment of the check. A question was attempted to be raised as to whether there was an obligation on the plaintiffs to give the defendant a notice of the dishonor of the check. I only mention it to say that it is unnecessary to decide the point; it was not taken at the trial, and we cannot entertain the question. The only point before us is, was there such a degree of laches on the part of the plaintiffs as made the check theirs? I am of opinion that there was no such laches.

QUAIN, J.: I am of the same opinion. The law on the subject of presentment of checks for payment is well established by *Alexander v. Burchfield* (*); *Robinson v. Hawkford* (*); and *Laws v. Rand* (*). It is in those cases laid down generally, that as between drawer and holder the presentment for payment must be within a reasonable time, and that the drawer is not discharged unless some loss is occasioned to him by the delay. The law is also so stated in *Byles on Bills*, p. 17. In this case the check having been received by the plaintiffs on the 27th, is handed by them to their bankers the next day, the 28th, and the bankers on that same day forwarded it by post direct to the drawees. There is ample evidence that, according to the custom of bankers, when a foreign check is paid to a banker by a customer, that is the usual mode of transmitting checks. Is that a good presentment? In *Bailey v. Bodenham* (*) Erle,

(*) 7 M. & G., 1061.

(*) 9 Q. B., 52; 15 L. J. (Q.B.), 377.

(*) 8 C. B., (N.S.), 442; 27 L. J. (C.P.), 76.

(*) 16 C. B. (N.S.), 288; 33 L. J. (C.P.),

253.

C.J., and Byles, J., thought that sending a check by post to a banker might be a good presentment of a check; and in *Prideaux v. Criddle* ⁽¹⁾ Lush, J., was of opinion that a presentment through the post-office was a reasonable mode of presentment. Therefore we have it that, in the present case, there was a due presentment of the check according to these authorities. The plaintiffs, therefore, are not guilty of any laches, nor have they done any act to make the check their own. It is unnecessary to express any opinion as to whether the plaintiffs ought to have given a notice of dishonor:

ARCHIBALD, J.: I am also of the same opinion. The only question is whether the plaintiffs have taken the proper course to have the check duly presented. I think they have, and that the check was presented in proper course, and that there was no laches on the part of the plaintiffs. There is no question before us as to notice of dishonor.

Rule absolute.

Attorneys for plaintiffs: *Johnson & Weatherall.*

Attorneys for defendant: *Courtenay & Croome.*

(¹) Law Rep., 4 Q. B., at p. 461.

[Law Reports, 9 Queen's Bench, 433.]

May 27, 1874.

*DAVIES, Appellant; HARVEY, Respondent. [433]

Guardian of the Poor—Goods ordered to be given in parochial Relief—Mens Rea.

By s. 77 of 4 & 5 Wm. 4, c. 76, "it shall not be lawful for any person hereafter to be appointed in any parish or union to any office concerned in the administration of the laws for the relief of the poor, or for any person who shall fill any such office, to furnish or supply for his own profit or on his own account any goods, materials, or provisions ordered to be given in parochial relief to any person in such parish or union. . . ."

The appellant was a guardian of the poor for N. Union; he was also a cabinet maker, and carried on business with D. as D. & Son; an application was made to the board of guardians for clothing and a bedstead for an out-door pauper of the union, and an order made by the guardians for clothing only; the relieving officer purchased from D. at the shop of D. & Son, a bedstead, which was delivered by D. at the house of the out-door pauper; the bedstead was only lent to the pauper by the guardians and remained their property; D. knew, but the appellant did not know, that the bedstead was purchased for the guardians and was to be supplied to the pauper by way of parochial relief:

Held, 1. That a guardian of the poor of a union is a person appointed to an office within the above section. 2. That the appellant was liable to be convicted under the above section, although he had not knowledge that the bedstead was to be given in parochial relief; and that it was immaterial whether the relieving officer to whom the bedstead was sold was authorized to purchase it. 3. That the bedstead, having been supplied gratuitously in the way of parochial relief, was "given in parochial relief" within the above section.

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Davies v. Harvey.

CASE stated by justices of Glamorganshire, under 20 & 21 Vict. c. 43.

The information charged that the appellant, being one of the guardians of the poor for the parish of Neath, in the Neath Union, and a person concerned in the administration of the laws for the relief of the poor, did furnish or cause to be furnished for his own profit or on his own account goods and materials, to wit, an iron bedstead ordered to be given in parochial relief to a certain poor person in the said union of Neath, contrary to 4 & 5 Wm. 4, c. 76, s. 77.

The following facts were either proved or admitted :

The appellant had been a guardian of the poor for the Neath Poor-law Union for many years, and was so during the month of July, 1872, when the bedstead was supplied.

Previously to goods being given or otherwise supplied in parochial relief, an application is made to the board of 434] guardians in a prescribed form by the relieving officer, and the order is made by the chairman writing down the terms of the order opposite the application in a book called the application and report book, and putting his initials thereto, and an order to the like effect is made in a book kept by the clerk called the relief order book.

On the 23d of July, 1872, an application was made in the prescribed form for clothing and a bedstead for T. Beasley, a pauper, by the relieving officer, and an order made that clothes be supplied, which order was duly confirmed.

The appellant, in the months of July and August, 1872, and for some years previously thereto carried on business at Neath, as a cabinet maker and upholsterer, in partnership with his son, J. F. Davies, under the style of Davies & Son.

On the 24th of July, 1872, the relieving officer purchased at the shop of Davies & Son, from J. F. Davies, an iron bedstead, which was, by the direction of the relieving officer, delivered by J. F. Davies at the house of one T. Beasley, an out-door pauper of the union, but there was no evidence to show that J. F. Davies or the appellant knew that the order had been given or the application made, nor that either of them knew as a fact that the bedstead was to be given or applied by way of parochial relief.

The appellant was not present when the bedstead was ordered, nor when it was paid for, nor when it was delivered, and the price thereof was paid to J. F. Davies alone, who made out the account for the same in his own name, and gave the receipt in the same manner.

The bedstead was only lent to the pauper, and remained the property of the guardians.

On the part of the appellant it was contended: That a guardian is not "a person appointed to an office concerned in the administration of the laws for the relief of the poor," inasmuch as guardians are elected by the ratepayers, and not appointed by any individual or corporation, or otherwise, and that therefore s. 77 of 4 & 5 Wm. 4, c. 76, does not apply to guardians, but only to appointed officers, such as clerks to guardians, relieving officers, overseers, masters of workhouses, and so forth. That the appellant did not furnish or supply the goods, the furnishing or supplying by J. F. Davies not being, under the circumstances, a furnishing or supplying *by the appellant. That the bedstead [435 was not "goods, materials, or provisions, ordered to be given in parochial relief," for although the application was for clothing and a bedstead, the order was only for clothing, and no order was made for the supply of the bedstead.

That the goods were only lent to the pauper and remained the property of the guardians, and, therefore, they could not be treated in construing a penal statute as having been "given in parochial relief." The justices were of opinion that the evidence given before them brought the case within the operation of the enactment under which the information was laid, and convicted the appellant.

The questions for the opinion of the court were: Whether a guardian is "a person appointed to an office," within the purview of s. 77 of 4 & 5 Wm. 4, c. 76. Whether the furnishing or supplying the goods in question by J. F. Davies was, under the circumstances, a furnishing or supplying by the appellant, within the meaning of the section. Whether there was a sufficient order for the goods supplied as "goods, materials, or provisions ordered to be given in parochial relief." Whether, as the goods were only to be lent and to remain the property of the guardians, they were given in parochial relief within the meaning of the statute.

Francis Turner, for the appellant: First, a guardian is not an officer concerned in the administration of the laws for the relief of the poor within the meaning of s. 77 of 4 & 5 Wm. 4, c. 76. That section only applies to officers who are paid for their services. Guardians are separately dealt with by s. 51, which must be read with 55 Geo. 3, c. 137, s. 6, and those enactments apply to the supply of goods to the workhouse or the poor of the parish generally, and not to supplying goods to an individual pauper, as in the present case: *Proctor v. Manwaring* (1); *Henderson v. Sherbourne* (2); *Barber v. Waite* (3). Secondly, it must be

(1) 3 B. & A., 145.

(2) 2 M. & W., 236.

(3) 1 A. & E., 514.

shown that the appellant had personal knowledge that the goods had been supplied to the pauper. The whole transaction took place between the appellant's partner and the 436] relieving officer without *the knowledge of the appellant. The case finds that there was no evidence to show that J. F. Davies, or the appellant, knew as a fact that the bedstead was to be given by way of parochial relief.

[BLACKBURN, J.: The questions asked of the court assume that J. F. Davies had a knowledge that the goods were ordered to be given in parochial relief.]

Thirdly, the order is insufficient. The application was for the supply of clothing and a bedstead, but the order is made only for clothes; there is no order to supply a bedstead.

[BLACKBURN, J.: It is immaterial whether there was an order; if the act was *de facto* done it is within the section. *Greenhow v. Parker* (') is directly in point.]

Fourthly, the bedstead was merely lent to the pauper. There was no offence committed within the section, which prohibits a supply of goods ordered to be given in parochial relief.

Poland, for the respondent: The appellant was rightly convicted. The 55 Geo. 3, c. 137, s. 6, prohibits churchwardens and overseers of the poor, and persons having the management of the poor, from supplying goods for the use of any workhouse; when 4 & 5 Wm. 4, c. 76, was passed, and new officers for the management of the poor were created, that enactment was, by s. 51, extended to those new officers, such as commissioners, guardians and other persons appointed under the provisions of that act. Then s. 77 of 4 & 5 Wm. 4, c. 76, prohibits any person concerned in the administration of the laws for the relief of the poor, whether appointed under 55 Geo. 3, c. 137, or 4 & 5 Wm. 4, c. 76, from supplying goods for their own profit to individual paupers; this was an offence which had not been provided for by the earlier act; the effect of these statutes now is, that if a guardian were to supply goods for the use of any workhouse or the poor generally, he would be liable to a penalty of £100, and if he were to supply goods to be given in relief to an individual pauper he would be liable to a penalty of £5. Sects. 51 and 67 create different offences, but a guardian is an officer within both sections. Secondly, if a person who is a guardian is in partnership with another, and the partner, for their mutual profit in the ordinary course of their business, supplies goods to an individual pauper, knowing that

(') 6 H. & N., 882; 31 L. J. (Ex.), 4.

it *is to be given in parochial relief, it is an offence [437 within the mischief of the enactments. The one partner is the agent of the other to supply goods from the common stock, and has authority to carry on the business for their mutual advantage; if a servant instead of a partner had supplied the goods the appellant would have been liable: *Mullins v. Collins*(¹). To constitute a crime there must be a *mens rea*, but this is an offence committed in carrying on a trade, and it is not necessary to prove personal knowledge; it is like the case of a nuisance committed by workmen in carrying on their employer's business without his knowledge; in such a case the employer would be liable to an indictment: *Reg. v. Stephens*(²). In *Nichols v. Hall*(³) it was decided that before a person could be convicted of having in his possession diseased cattle without giving notice of the fact to a police constable it must be found that the animals were affected with disease to his knowledge; and in *Hearne v. Garton*(⁴), in order to convict a person of sending vitriol by a public conveyance it must be shown that the sender had a guilty knowledge; but it is obvious that in those cases knowledge was the gist of the offence. Thirdly, it is immaterial whether there was a sufficient order or not. Fourthly, there was a purchase of the bedstead by the relieving officer, so that the property in it vested in the guardians of the union, and it is lent to the pauper for his use; it is therefore relief to the pauper just as much as if the bedstead had been absolutely given to the pauper, and it is an offence within the meaning of s. 77.

F. Turner, was heard in reply.

BLACKBURN, J.: I think the conviction should be affirmed. Notwithstanding the ingenious way in which the statement in the case as to the purchase of the bedstead is framed, we must assume that the justices have found that J. F. Davies, the appellant's partner, knew that the goods were ordered by the relieving officer on behalf of the parish; and he also knew that the goods ordered were to be delivered at the pauper's residence, to be used by the pauper, and that they were ordered to be given to him by way of *parochial [438 relief. We are not asked whether there is any evidence to support the conviction; I think, however, there is ample evidence. But we are asked first whether a guardian is a person appointed to an office within the purview of 4 & 5 Wm. 4, c. 76, s. 77. That he is a person appointed to an

(¹) Ante, p. 292.

(²) Law Rep., 1 Q. B., 702.

(³) Law Rep., 8 C. P., 322.

(⁴) 2 E. & E., 66; 28 L. J. (M.C.), 216.

office concerned in the administration of the laws for the relief of the poor seems to me to be beyond all doubt. It has been argued, on behalf of the appellant, that inasmuch as s. 51 of 4 & 5 Wm. 4, c. 76, extends the provisions of 55 Geo. 3, c. 137, s. 6, and expressly mentions guardians, and a guardian is liable under that section to a penalty, he could not possibly be subjected to another penalty under s. 77; and therefore a guardian was not a person within that section; but it is obvious, when we look at the object of the legislation, a guardian is a person within the words of both sections. Sect. 6 of 55 Geo. 3, c. 137, extended to guardians under s. 51 of the later act, is intended to prohibit the wholesale supply of goods to a workhouse, while s. 77 of 4 & 5 Wm. 4, c. 76, prohibits the supply of goods to one individual pauper. The penalty in the first case being £100, and in the latter case £5. The second question we are asked is whether the furnishing or supplying of goods by J. F. Davies was a supplying of goods by the defendant. Sect. 77 makes it illegal for a guardian to furnish or supply for his own profit, or on his own account, goods ordered to be given in parochial relief. Now the goods were supplied by the appellant's partner, J. F. Davies, within the scope of the partnership authority for the profit of both partners. If this section made the supplying of goods a crime, I should say it would require something more than that the goods had been supplied under a general authority given to a partner to make the copartner liable for a crime; but when we look at the object of the section and its language I think it forbids the supplying of goods by a guardian for his own profit and on his own account; whether that be done through the agency of a partner, or a manager, or a servant, the mischief certainly is the same. I agree that, in order to make the supply of goods an offence, it must be shown that the partner or manager entrusted with authority by the copartner or master was aware that he was dealing in the supply of goods given in parochial relief. I think it is [439] necessary that knowledge should in that sense *be brought home to a guardian; I do not think it necessary to show that he had personal knowledge, it is sufficient to constitute the offence if the partner or manager who supplied the goods had knowledge. With regard to the third question; it is immaterial whether the order was sufficient. It is decided by *Greenhow v. Parker* (1), and, in my opinion, rightly decided, where a relieving officer does in fact himself supply

(1) 6 H. & N., 882; 31 L. J. (Ex.), 4.

goods to a pauper and charge the parish, that he is liable to a penalty, whether he has an order or not; and that is good sense. As to the last question, it appears that the pauper was only to have the use of the bedstead, and we must assume that J. F. Davies knew it was purchased for the purpose of enabling the pauper to use it. It would not, however, become the pauper's property, but would be resumed by the parochial authorities when the pauper no longer required it. The question, then, is whether supplying articles to be lent to and used by the pauper by way of parochial relief is within s. 77. I think the enactment is not confined to the case of goods that are to be given, to be parted with altogether, but extends to the case of supplying goods to a pauper which the pauper was to have in consequence of relief being ordered him, goods which he was to have gratuitously. Our judgment must therefore be for the respondent.

LUSH, J.: I am of the same opinion. With regard to the latter part of the case I think the facts bring it precisely within the words of the section. The relieving officer ordered at the shop of the appellant and his partner an iron bedstead to be sent to the pauper, and it was supplied by the partner and sent to the pauper's house, he knowing at the time that it was sent in pursuance of an order for parochial relief. The word "given" cannot be construed in s. 77, in its strict literal sense, it must be construed as being supplied gratuitously, whether as an absolute gift or not in the way of parochial relief. I think the case comes within the very words of the enactment. The material question, no doubt, is whether the appellant is liable, he not personally knowing at the time of the supplying of this bedstead, that it was to be given in parochial relief. From the words of the enactment I am of opinion that he is a person within the very scope and object of s. 77. *The section does [440 not make the supplying of goods a crime, but prohibits it by a penalty; the intention is to prevent persons who hold offices concerned in the administration of the laws for the relief of the poor dealing for profit with the parish. The bedstead was supplied with the knowledge of the appellant's partner, under a general authority given by the appellant, for the benefit of the appellant and the partner, and it was supplied by way of parochial relief. The goods are supplied in that sense by the appellant, though actually supplied by his partner; he shares the profit, and it is supplied on his account; I think it is strictly within the words as well as the obvious intention of the enactment. Were it otherwise,

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Eastwood v. Miller.

it would make a very wide way for evasions of this very salutary enactment.

Judgment for the respondent.

Attorneys for appellant: *Cowdell, Grundy & Browne.*

Attorney for respondent: *Peacopp.*

Where a statute provided that "It shall not be lawful for a member of the common council of any city in this state * * * to become a contractor under any contract authorized by the common council, &c., * * * of which he is a member, or be in any manner, directly or indirectly interested, either as principal or surety in such contract," and that "contracts in violation of the above provisions may be declared void at the instance of the city * * * or of any other party interested in such contract": Held, that plaintiff, a livery

stable keeper, could not recover from the defendant for carriages, &c., furnished by him while an alderman of the city, upon the order of a committee appointed by the common council to make arrangements for the celebration of the Fourth of July: Held, also, that the defendant might either bring an action to have the contract declared void, or set up its invalidity in an action brought to recover upon it: *Smith v. City of Albany*, 7 Lansing, 14, affirmed by the Commission of Appeals, Jan. 15, 1875. *Mullaly v. Mayor*, 6 N.Y. Sup. Ct. R., 168.

[Law Reports, 9 Queen's Bench, 440.]

June 8, 1874.

EASTWOOD, Appellant; MILLER, Respondent.

Gaming—Betting Houses Act (16 & 17 Vict. c. 119), s. 8—"Place"—Pigeon-shooting Match.

The appellant was the occupier of certain enclosed grounds, in which a pigeon-shooting match between two persons for £10 a side, and afterwards a foot-race took place, and into which the public were admitted on payment of money. The persons who were admitted into the grounds made bets with each other both on the pigeon-shooting match and on the foot-race:

Held, that the grounds were a "place," and that they were kept and used by the appellant for the purpose of betting within the meaning of the Betting Houses Act (16 & 17 Vict. c. 119), s. 8.

CASE stated by justices for the borough of Dewsbury, in the West Riding of Yorkshire, under 20 & 21 Vict. c. 43.

The appellant was charged on an information that he did unlawfully use a certain place, to wit, a field, for the purpose of betting on a certain pigeon-shooting match for money, contrary to 16 & 17 Vict. c. 119, s. 3 (1).

(1) 16 & 17 Vict. c. 119, s. 1. "No house, office, room, or other place, shall be opened, kept, or used, for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by, or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the

business thereof, betting with persons resorting thereto: or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid, as and for the consideration of any assurance, undertaking, promise, or agreement, express or implied, to pay, or give thereafter any money or valuable thing on any event or contingency of, or relating to, any horse-

*At the hearing the following facts were proved. [441] On Saturday, the 15th of November, 1873, G. F. Whittet, police constable, and two other officers, went to the borough park ground, occupied by the appellant. On arriving at a gate at the entrance, a man stopped him, and asked him for a ticket. Whittet told the man at the gate that he was a policeman, and did not require one. He saw other people pay money and receive a ticket, who were then admitted into the grounds. He and the other officers were also admitted into the grounds, which are enclosed and contain an area of 3a. 3r. 25p. He there saw a number of people, and amongst them two bookmakers with books in their hands. These two men were shouting out, "Twenty to two on the match." The match about to take place was a pigeon-shooting match for £10 a side between a person of the name of Parkinson and a person of the name of Wooler. Two men came alongside Whittet and up to one of the bookmakers, and one of them gave to one of the men with a book a sovereign. As this man was getting some change back, the other man said, "Hold on, that will do for both of us." The bookmaker took a ticket out of his book and gave it *to one of the men, and said, "That's on Wooler." [442] Soon after this, Wooler was going to shoot at a pigeon, when a man shouted out, "Four to one he kills." This bet was taken, and the man said, "Three to one he kills." Persons were shouting all over the grounds. Appellant was standing near to Whittet, and could hear what the bookmakers and other persons said, but did not take any part or say anything. After the pigeon match a foot-race took place, at which bets were made as before on the pigeon-shooting match.

It was contended on behalf of the appellant, first, that the ground was not used or permitted to be used by the appellant for betting. Secondly, that the ground was not a "place" within the meaning of the act. The case of *Dog-*

race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid. . . ."

Sect. 3. "Any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned or either of them, or any person who, being the owner or occupier of any house, room, office, or other place, shall

knowingly or wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid or either of them, and any person having the care or management of, or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid or either of them, shall, on summary conviction thereof before any two justices of the peace, be liable to forfeit and pay such penalty not exceeding one hundred pounds as shall be adjudged by such justices. . . ."

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gett v. Catterns (') was quoted, in which the appellant was in the habit of going beneath a tree in Hyde Park, and there receiving bets from persons on horse-races.

The justices were of opinion that the appellant was the sole occupier of the enclosed ground, and received money for admission; that it was a "place" within the meaning of the act; and that the appellant knowingly used, or permitted the same ground to be used, for the purpose of betting, and convicted the appellant.

The question for the opinion of the court was, whether the ground was used or permitted to be used by the appellant for the purposes of betting, and whether the ground was a "place" within the meaning of the act.

Forbes, for the appellant, argued that the conviction could not be supported on the authority of *Doggett v. Catterns* ('); *Clark v. Hague* ('); *Morley v. Greenhalgh* ('); *Coyne v. Brady* (').

The respondent did not appear.

LUSH, J.: The question in this case is, whether there is evidence to justify the magistrates in coming to the conclusion that the defendant used or permitted to be used the premises described for the purpose of betting, and that 443] question resolves itself into two. *The magistrates, first of all, ask us to say whether the ground as described was a "place" within the meaning of the act of Parliament; and, secondly, if it was a "place," whether upon this evidence the defendant used or permitted it to be used for the purpose of betting. [The learned judge then read the statement in the case.]

Now the question is, whether these facts justified the magistrates in coming to the conclusion that these enclosed grounds were a place within s. 3 of 16 & 17 Vict. c. 119; and, secondly, whether the appellant used or permitted that place to be used for the purpose of betting.

I am of opinion that there was evidence to justify the magistrates in coming to the conclusion that this was a "place" within the meaning of the act; and, secondly, that the defendant used and permitted the place to be used for the purpose of betting, in violation of the act.

First, was it a "place?" It could hardly be contended that grounds uncovered cannot be a "place" within the meaning of the act. I see no reason whatever, from the

(1) 19 C. B. (N.S.), 765; 34 L. J. (C.P.), 159. (2) 3 B. & S., 374; 32 L. J., (M.C.), 93.

(2) 2 E. & E., 281; 29 L. J. (M.C.), 105. (4) 12 Ir. C. L., 577.

framing of the act, to hold that there cannot be a "place" within the meaning of the act unless it is a structure of some kind—a building or a tent. An enclosed area, though uncovered, might as well be a "place" within the act as a place either covered with canvas, as a tent, or a light structure, as a building. It is an enclosed place, occupied exclusively by the appellant, and is therefore within the language and the intent of the act. The fact that it is a large enclosure cannot affect the question. Whether it is a quarter, a half acre, or three acres cannot affect the question, if it is a "place" occupied and enclosed within the meaning of the act, to which persons were admitted by the sufferance of the occupier.

Now, the cases which have been cited in no way limit the construction of the act, or the construction I have thought it right to put upon it. In *Doggett v. Catterns* (*) a person was convicted of having kept a betting table under one of the trees in Hyde Park. It could not be said that that was a place used for the purpose of betting; the person there was not an occupier of the place, and he had no business to use it for that purpose. The same may be said of the [444 cases of *Clark v. Hague* (*) and *Morley v. Greenhalgh* (*). The persons resorted, in the last case, to a quarry for the purpose of witnessing a cock-fight, and it was held, on the authority of *Clark v. Hague* (*), that the quarry was not a place kept or used by the occupier of the quarry for the purpose of cock-fighting. He had nothing to do with the men being there, and they had no business there. The act is not directed against persons assisting at a cock-fight, but only against those who keep and allow a place to be used for the purpose of cock-fighting. The same observation applies to the case of *Clark v. Hague* (*). But in the case before us, what was done was done with the consent of the appellant, who was the sole occupier of the enclosed ground. It was he who allowed persons to come there on paying for a ticket. He was, as I have said, the sole occupier of the premises, and he was the person who permitted that place to be used for the purpose for which it was used.

The other question is, whether there was evidence that "the place" was kept and used for the purpose of betting? It is objected that it was only shown that on one occasion this was done; and, moreover, it was objected, that the primary object of keeping the place was not for the purpose of betting, but for the purpose of pigeon-shooting, and that

(*) 19 C. B. (N.S.), 765; 34 L. J. (C.P.), 159.

(*) 2 E. & E., 281; 29 L. J. (M.C.), 105.

(*) 8 B. & S., 374; 32 L. J. (M.C.), 93.

in construing the act we must regard the primary object for which the place was kept or used, and not that which appears to have been only incidental. It was argued that the betting was only incidental to the pigeon-shooting. I cannot take this view of the evidence. I think there was enough to justify the magistrates in coming to the conclusion that the owner of these premises did permit them to be used for the purpose of betting as well as for the purpose of pigeon-shooting; and that there was very good reason to guide the magistrates to the conclusion that it was kept for both purposes, for the appellant perfectly well knew that allowing it to be used for pigeon-shooting would also introduce a number of persons who would bet upon the matches, and he kept it, therefore, for that as well as the other, and the two purposes were combined; the magistrates, therefore, might well come to the conclusion that the appellant did wilfully *and knowingly permit the place to be used by persons for the purposes of betting. I ought to add that *Coyne v. Brady* (') is similar to *Doggett v. Catterns* ('). There the person resorted to a place where he had no business to go, and where he had no permission to go, and therefore that case does not govern the present.

I think, therefore, the magistrates were right in coming to the conclusion they did, and in convicting the appellant.

ARCHIBALD, J.: I am of the same opinion. There are two questions: first, whether this is a "place" within the meaning of 16 & 17 Vict. c. 119; and, secondly, whether there is evidence that it was permitted to be used for the purpose of betting.

I think we should fall very far short in carrying out the object of this act, if we were to hold that it was necessary that there should be a room, or house, or office, or erection of some kind, in order to its being a "place" within the meaning of the act. There may be a "place," although it is open to the air; there may be a "place" without any kind of erection; and of course it must depend upon the circumstances of each particular case whether it is brought within the description of "place." Upon the facts as they appear here, the magistrates were justified in holding that this was a "place." The area is of three or four acres in extent. The "place" is one enclosed, having a gateway. Persons were admitted by ticket, and on payment of a price for entrance. The appellant is the occupier of this enclosed land, and received money from the persons for admission into it. I think that, under those circumstances, it cannot

(') 12 Ir. C. L., 577.

(') 19 C. B. (N.S.), 765; 34 L. J. (C.P.), 159.

be doubted that this was a "place" within the meaning of the act. It differs entirely from *Doggett v. Catterns* ⁽¹⁾ and *Coyne v. Brady* ⁽²⁾. In the first case, the "place" was a spot under a tree in Hyde Park, to which the person had no right to resort, and in the other case the facts were very much the same.

Then arises the other question: was this a place permitted by the occupier or owner knowingly and wilfully to be used for the purpose of betting? It is argued that the grounds were used for pigeon-shooting and foot-races, and that the betting was merely *incidental to that pur- [446] pose, and that therefore it was not used for the purpose of betting. It seems to me that that contention cannot be maintained, and although persons may resort to it for the purpose of witnessing the shooting matches and running matches, if they are allowed to bet there, it is impossible to say the place is not used for betting. I think that the evidence before the magistrates justified them in finding that this was a place used for the purpose of betting. I think, on these grounds, it is brought within the operation of s. 3, and that the cases cited in the argument have no bearing upon the present case; because in those cases the use of the place was not by the permission of the occupier, or by the permission of any person having authority to give permission to use it, but by some person who took upon himself to go there when he had no permission and no business to be there for such a purpose. Here the person who gave permission was the occupier of the premises in question. I think that makes a difference, and that the conviction was right.

Judgment for the respondent.

Attorneys for appellant: *Blakeley & Berwick, for Ibber-son, Dewsbury.*

(1) 19 C. B. (N.S.), 765; 34 L. J. (C.P.), 159.

(2) 12 Ir. C. L., 577.

[Law Reports, 9 Queen's Bench, 446.]

June 5, 1874.

SMIDT V. TIDEN and Another.

Ship and Shipping—Charterparty—Implied Contract to pay Freight.

A charterparty was entered into in London on the 17th of June, 1872, between plaintiff, as master of a ship lying at London, and R. B. L., a shipbroker, to carry 407 tons of iron from H. to G., at freight of 7s. 3d. per ton. Freight to be paid in London on signing bills of lading, the owner or master to have an absolute lien for

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freight. On the following day L. chartered the ship to the defendant at 8s. per ton for the same amount of iron. The charter contained similar clauses as to freight and lien, and the following clause at the end: "The brokerage of 5 per cent. is due on the execution of this charter to R. B. L., by whom the vessel is to be entered and cleared at the port of loading." Though the defendant thought he was treating with L. as broker for the ship, L. had no authority in fact to act as broker for the plaintiff, or to receive the freight; and neither plaintiff nor defendant knew of the charter entered into by the other. The cargo having been put on board by defendant, the master signed bills of lading making it deliverable to consignees or assigns, "they paying freight for the said goods as per charterparty." The plaintiff did not demand [447] the freight on *signing the bills of lading. The cargo was duly delivered at the port of discharge; and in the mean time L. obtained payment of the freight of 8s. per ton from defendant, and afterwards stopped payment, leaving the 7s. 3d. per ton unpaid to plaintiff. The plaintiff having sued defendant for the 7s. 3d. per ton for the carriage of the iron:

Held, that the plaintiff could not recover: for that the plaintiff and defendant never were *ad idem*, and consequently there was no express contract between them; and that, under the circumstances, no contract to pay reasonable freight for the carriage could be implied on the shipment of the goods.

CASE stated by consent without pleadings.

The facts are fully stated in the judgment of the court.

May 29. *Cohen*, Q.C. (with him *Hollams*), for the plaintiff: Although the defendants were deceived by Lyth, and were led by him to think he was the broker of the ship, and although, therefore, there may be no express contract between the plaintiff and defendants, still a contract to pay a reasonable freight for the carriage arose on the mere shipment of the goods: *Domett v. Beckford* (*).

[ARCHIBALD, J.: There there was no charterparty.]

Sandeman v. Scurr (*) shows that the defendants, having delivered their goods to be carried in ignorance of the charter, get a right of action by the bill of lading against the shipowner as to the safe carriage of the goods; and the converse must hold, that the shipowner can maintain an action for freight.

R. G. Williams, Q.C. (*Lanyon* with him), for the defendants: Through the fraud of Lyth the plaintiff and defendants were kept in ignorance of the others' charterparty, so that they never were *ad idem*, and consequently no express contract was ever made between them; nor can any contract be implied under the circumstances. *Sandeman v. Scurr* (*) is distinguishable. Here the plaintiff knows of the charter, and therefore the master signs as agent of the charterer, and not as agent of the owner.

[LUSH, J.: Not exactly as agent of the charterer, but because he is bound to sign by reason of the charterparty.]

Then the plaintiff signed under the charter to Lyth, [448] and not *under the charter to the defendants. So

(*) 5 B. & Ad., 521.

(2) Law Rep., 2 Q. B., 86.

that, in any view, the plaintiff and defendants never were *ad idem*.

[As the judgment of the court turned upon this point, it is unnecessary to give the arguments further. The following cases were referred to: *Major v. White* ⁽¹⁾; *Newberry v. Colvin* ⁽²⁾; *Marquand v. Banner* ⁽³⁾; *Gilkison v. Middleton* ⁽⁴⁾; *How v. Kirchner* ⁽⁵⁾; *Kirchner v. Venus* ⁽⁶⁾; *The Teutonia* ⁽⁷⁾; *Mercantile Bank v. Gladstone* ⁽⁸⁾; *Raffles v. Wichelhaus* ⁽⁹⁾; *Peek v. Larsen* ⁽¹⁰⁾.]

Cohen, Q.C., in reply, cited *Michenson v. Begbie* ⁽¹¹⁾.

Cur. adv. vult.

June 5. The judgment of the court (Mellor, Lush, and Archibald, JJ.), was delivered by

LUSH, J.: This is an action to recover freight for the carriage of railway iron from Hartlepool to Gothenburg, under the following circumstances:

On the 17th of June, 1871, a charterparty was entered into in London between the plaintiff, as the master of the ship Gothenburg, then lying in the port of London, and one R. B. Lyth, a shipbroker, whereby the plaintiff engaged to proceed forthwith to Hartlepool and there take on board 407 tons of railway iron, and carry the same to Gothenburg, on being paid freight at the rate of 7s. 3d. per ton. The freight to be paid in London on signing bills of lading. The owner and master to have an absolute lien for all freight, dead freight, demurrage, and all other charges. The master to sign bills of lading as presented without prejudice to the charter.

Having obtained this charter, Lyth, on the following day, the 18th of June, chartered the Gothenburg to the defendants to carry the same quantity of railway iron from Hartlepool to Gothenburg *at 8s. per ton; freight to be [449 paid in London, less insurance, on signing bills of lading. This charter contained a similar clause of lien for freight, dead freight, demurrage, and a clause in the following terms: "The brokerage of 5 per cent. is due on the execution of this charter to R. B. Lyth, by whom (or his agents) the vessel is to be entered and cleared at the port of loading."

It was argued, and with reason, from this latter clause,

⁽¹⁾ 7 C. & P., 41.

⁽²⁾ 1 Cl. & F., 288, 297.

⁽³⁾ 6 E. & B., 282; 25 L. J. (Q.B.),

313.

⁽⁴⁾ 2 C. B. (N.S.), 184; 26 L. J. (C.P.), 160.

209.

⁽⁵⁾ 11 Moo. P. C., 21.

⁽⁶⁾ 12 Moo. P. C., 361.

⁽⁷⁾ Law Rep., 4 P. C., 171.

⁽⁸⁾ Law Rep., 3 Ex., 288.

⁽⁹⁾ 2 H. & C., 906; 33 L. J. (Ex.),

160.

⁽¹⁰⁾ Law Rep., 12 Eq., 378.

⁽¹¹⁾ 6 Bing., 190.

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that the defendants knew they were treating with a broker, and not with the owner; but it was found as a fact that Lyth had no authority to act as broker for the plaintiff, to effect the charter, or to receive the freight ⁽¹⁾.

Neither the plaintiff nor the defendants had any notice or knowledge of the charter entered into by the other of them until after delivery of the cargo. The master knew nothing of the charterparty between Lyth and the defendants; the defendants knew nothing of the charterparty between the master and Lyth.

The vessel proceeded to Hartlepool, and there took in from the defendants the 407 tons of railway iron. Having shipped the cargo, the defendants presented a bill of lading making the cargo deliverable to "order or assigns, he or they paying freight for the said goods as per charterparty," which the master signed and gave out, without requiring payment of the freight. At the port of discharge the iron was delivered on the 25th of August to the order of defendants without the lien being insisted on. Meanwhile, on the 2d of August Lyth obtained payment of the freight of 8s. per ton from the defendants, pursuant to his charter of the 18th of June, and shortly afterwards stopped payment, leaving the freight of 7s. 3d. per ton unpaid.

It thus appears that each of the parties to the action acted under a mistake. The master supposed that the bill of lading which he signed referred to his charterparty with Lyth; the defendants, on the other hand, supposed that it referred to the charterparty which they had made with Lyth. Each of them was ignorant of what was in the mind of the other; each acted in good faith; and neither of them did anything calculated to or which did in any way mislead the other. Under these circumstances, the bill of lading being ambiguous and equally capable of being applied to the one charterparty as to the other, we cannot hold it to be a contract or evidence of a contract between the parties. It does not express that which was common to both minds, and, therefore, it is not binding upon the parties.

But it was contended that, putting aside the bill of lading, the mere shipment of the goods raised an implied contract by the shipper to pay a reasonable freight to the master for the carriage. Under certain circumstances this may be so, but no such implication can exist in the present case. The diversity of mind and purpose, which vitiates the bill of lading, and prevents that from being evidence of the con-

(1) It was also found as a fact that defendants did not know that Lyth had no authority.

tract, existed at the time of the shipment. The goods were put on board in the supposed fulfilment of one charterparty by which the shipper was to pay 8s. per ton to Lyth, and they were accepted in supposed fulfilment of another, by which Lyth was to pay 7s. 3d. per ton to the master. At no stage of the transaction were the parties *ad idem*. It follows that there was no contract, express or implied, upon which the plaintiff can recover against the defendants. Had he insisted on payment on signing the bill of lading, as he might have done; or had he enforced his lien at the port of delivery, he might have protected himself from loss. Not having done so, he has no means of obtaining payment from the defendants.

We, therefore, give judgment for the defendants.

Judgment for the defendants.

Attorneys for plaintiff: *Hollams, Son, & Coward.*

Attorney for defendants: *H. P. Sharp.*

[Law Reports, 9 Queen's Bench, 451.]

June 8, 1874.

***DE WOLF V. THE ARCHANGEL MARITIME BANK AND [451]
INSURANCE COMPANY (LIMITED).**

Marine Insurance—Words "at and from" a Port—Implication that there should be no unreasonable Delay in Ship reaching Port.

In a voyage policy of insurance "at and from" a port, it is an implied understanding that the ship shall be at the port within such a time that the risk shall not be materially varied; and if there is delay beyond such time, the policy does not attach.

DECLARATION on a policy of insurance, dated the 12th of July, 1872, upon chartered freight in a ship called the Florence Chapman, at and from Montreal to Monte Video. Plea (amongst others), that at the time of making the policy the ship was not, nor did the ship within a reasonable time thereafter arrive, at Montreal, and great and unreasonable delay occurred before the ship arrived at Montreal, being a delay which was material to the risk of the policy, and by reason thereof the policy at the commencement of the risk had not attached.

Issue joined.

At the trial, in the Mayor's Court, before the Common Sergeant, a verdict was found for the defendants with leave to the plaintiff to move.

A rule was afterwards obtained by the plaintiff for a new trial, on the ground that the Common Sergeant misdirected

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the jury, first, in not leaving to them the question whether the delay in commencing the risk was justified by necessity; secondly, in directing them that the only question was whether such delay altered the risk.

April 30. *C. Bowen* showed cause.

Benjamin, Q.C., and *Aspland* supported the rule.

The facts, the course at the trial, and the arguments sufficiently appear in the judgment of the court.

In addition to the authorities referred to in the judgment, the following were cited: *Small v. Gibson* (¹), *Beckwith v. 452*] **Sydebotham* (²), *Grant v. King* (³), *Phillips v. Irving* (⁴), *Jones v. Neptune Marine Insurance Co.* (⁵).

[BLACKBURN, J., referred to *Jackson v. Union Marine Insurance Co.* (⁶).]

Cur. adv. vult.

June 8. The judgment of the court (Cockburn, C.J., Blackburn and Lush, JJ.) was delivered by

BLACKBURN, J.: This was an action tried in the Mayor's Court, before the Common Sergeant.

The action was on a voyage policy on ship "at and from Montreal to Monte Video."

The 4th plea, on which alone the question before us arises, was that the ship was not at Montreal within a reasonable time, being a delay materially varying the risk. The facts as to this were, that the policy was effected on the 13th of July at a premium of 2 per cent. No question was asked by the underwriter as to where the ship then was, and no information was offered by the assured; but in fact she was then at sea on a voyage intended to end at Montreal. She did not arrive at Montreal till the 30th of August. Evidence was given that the delay in the arrival at Montreal changed the voyage from a summer one to a winter one, which materially affected the risk and the rate of premium.

Evidence was offered on the part of the plaintiff, that the delay in arriving at Montreal was not voluntary on his part, but was occasioned by perils of the seas on the voyage out to Montreal.

The Common Sergeant rejected this evidence, giving leave to the plaintiff to move in this court for a new trial on this ground.

The case was then left to the jury, who found that the delay was unreasonable, and that the risk was thereby materially changed.

(¹) 16 Q. B., at p. 156.

(²) 1 Camp., 116.

(³) 4 Esp., 175.

(⁴) 7 M. & G., 325.

(⁵) Law Rep., 7 Q. B., 702.

(⁶) Law Rep., 8 C. P., 572.

A rule *nisi* was obtained for a new trial, which was argued in last term before my lord, my Brother Lush, and myself, when the court took time to consider.

As the evidence was rejected, we must consider the case as if it had been received and had established what it was offered to *prove, and as if the jury had found not [453 only, as they have done, that there was unreasonable delay between the making of the policy and the commencement of the risk intended to be insured against, materially altering that risk, but also that the delay was occasioned by matters beyond the control of the assured. And then we have to determine whether that would be a defence or not.

Nothing would seem easier than for the parties making a policy to insert a few words preventing all possibility of dispute on such a point. If the insurance had been in this case "at 5 per cent., to return 3 per cent." if the ship was at Montreal on or before some named day, there would have been no question but that the underwriters would, in this case, have been liable, and the assured would not have had to pay the winter premium unless the underwriter ran the winter risk. If the underwriters had inserted "warranted to be at Montreal on or before" some named day, there can be no doubt that the risk would not have attached; and in either case, by naming a fixed day, the controversy as to when the risk became varied would be avoided. But we are informed that in practice there are great if not insuperable difficulties in the way of introducing unusual clauses into policies, and that brokers prefer the risk of causing litigation at the expense of their customers to the risk of frightening away custom by proposing something unusual. We must anticipate that policies will continue to be made as this has been; and the question before us is therefore one of considerable importance.

It is quite clear that the words "at and from a particular place," do not import either a warranty or a representation that the vessel at the time of making the policy is already at the place. In *Hull v. Cooper* ⁽¹⁾, decided in 1811, the case was one of an insurance on goods "at and from Heligoland to a port in the Baltic." At the time when the policy was effected, the 13th of August, the ship was in the Thames, which fact was known to the assured and not communicated. She did not sail from the Thames till the 27th of August, a fortnight later, which latter fact could not have been known to the assured at the time of making the policy, as it had not then happened. The plaintiff having obtained

⁽¹⁾ 14 East, 479.

454] a verdict, a *motion for a new trial was refused. It appears from the report as if the counsel who moved treated the case entirely as one of concealment and not as one of a change of risk; but Lord Ellenborough, in his judgment, separates the two questions. He says: "When a broker proposes a policy to an underwriter on a ship at and from a certain place, it imports either that the ship is there at the time or shortly will be there; for if she is only to be there at a distant period that might materially increase the risk. But it has never been understood that the terms of such a policy necessarily imported that the ship was at the place at the very time so as to make the assured guilty of deception if she were not." So far he is dealing with the non-disclosure of the fact that the ship was in the Thames on the 13th of August. He then proceeds: "It was a question for the jury, whether the intervening period materially varied the risk in this instance; the interval being from the 13th to the 27th of August, with the additional days which elapsed from the sailing till she reached Heligoland. And the jury were not persuaded that the risk was thereby varied, and found for the plaintiff." And Bayley, J., says, "It was a question for the jury whether the delay in reaching Heligoland for so many days after the policy was effected, materially varied the risk." The affirmative decision here is, that a delay not varying the risk does not discharge the underwriter, but the opinion is express that a delay materially varying the risk does discharge the underwriter, though that was not the very point decided.

In *Driscoll v. Passmore* (*), decided in 1798, where an analogous question arose and the plaintiff recovered, it is stated in the report, that "it was in evidence that the difference of season arising from this delay did not vary the risk." *Brine v. Featherstone* (*) came before the court on a rule to enter the verdict on a point reserved at the trial, and the court in banc had not to consider whether the delay was such as to discharge the underwriters. The facts as stated in the report appear to be such as would have afforded evidence that the delay was such as to vary the risk; but if that defence was raised at *nisi prius*, which does not appear to have been the case, there may have been some other evidence not stated in the report which justified the finding of the 455] *jury. Neither of those cases can, as we think, be considered in conflict with *Hull v. Cooper* (*).

The case, however, that comes nearest to the present is

(*) 1 B. & P., 200.

(*) 4 Taunt., 889.

(*) 14 East, 479.

that of *Mount v. Larkins* ⁽¹⁾. In that case the facts were found in a special verdict, a part of which only is set forth in the report. The policy was on the ship *Aquila*, at and from Singapore and Batavia, both or either, to the ship's port of discharge in Europe. In the report it is said that it was found that the policy was entered into on the 28th of February, 1824; that the ship sailed from England in the beginning of September, 1823, on a voyage to the Cape of Good Hope, Van Dieman's Land and Sydney, and thence to Singapore. It is not stated in the report that it was known to the underwriters that she was bound on this preliminary voyage, but it is scarcely possible that it should be otherwise, and in the judgment of the court it is assumed throughout that it was known to them. The jury found that there was "unreasonable and unjustifiable delay between the making of the policy of assurance and the commencement of the risk intended to be insured against." On this the Court of Common Pleas decided in favor of the defendants, saying "We must intend that the risk was in fact varied, and consequently the underwriters discharged." This would be precisely in point, were it not that it was there expressly found that the delay was unjustifiable, and that in the present case the plaintiff has not been allowed to give evidence to show that the delay was not from any fault of his. The ground on which the judgment delivered by Tindal, C.J., in *Mount v. Markins* ⁽²⁾ is based is that "The underwriter has as much right to calculate upon the outward voyage on which the ship is then engaged being performed in a reasonable time and without unnecessary delay, in order that the risk may attach, as he has that the voyage insured shall be commenced within a reasonable time after the risk has attached. In either case the effect is the same as to the underwriter, who has another risk substituted instead of that which he has insured against, and in both cases the alteration is occasioned by the wrongful act of the insured himself." This may be relied on as an expression of opinion that the delay, if necessary, would not discharge the underwriters. It may be so, where the fact that the vessel is on a preliminary voyage is known and [456 communicated to the underwriter, so as to make that the basis of the contract; and it seems to have been understood by Tindal, C.J., that the principle on which the cases of *Vallance v. Dewar* ⁽³⁾ and *Ougier v. Jennings* ⁽⁴⁾ were decided was on the ground of notice. He says in both those cases,

⁽¹⁾ 8 Bing., 108.⁽²⁾ 1 Camp., 503.⁽³⁾ 8 Bing., at p. 122.⁽⁴⁾ 1 Camp., 505, n.

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"It is admitted that a delay in the commencement of the risk, by the interposition of an intermediated voyage not communicated to the underwriters, would discharge the policy, unless such intermediate voyage was one which was made usually and according to the course of the trade in which the ship was then engaged, which would be equivalent to notice to the underwriters."

We need not in the present case decide how that is, for there was no communication made to the underwriters as to where the ship was at the time when the policy was made. And we think it, under such circumstances, not material whether the delay which varies the risk was occasioned by the fault or the misfortune of the assured. In either case the risk is equally varied.

Where the alteration in the course of the voyage after the risk has attached is justified by necessity it does not vary the risk. The underwriter has undertaken to insure the vessel during the usual and proper course of the adventure. Now, though, under ordinary circumstances, the usual proper course of a voyage is to proceed direct, or if chased by a hostile cruiser, or forced to run before a storm, to go out of the direct course, the underwriter takes his chance of the vessel being forced to do so. But the underwriter does not take upon himself any part of the risk of the vessel being delayed so long as to vary the risks by perils of the sea or otherwise on its passage to the port where the risk is to attach. This seems involved in the decision of *Hull v. Cooper* (¹), that the assured is not bound to communicate to the underwriter the place where the vessel is at the time of insurance. For if the time when the risk is to attach might be indefinitely delayed by perils affecting the passage from the place where the vessel was, it must be material to the underwriter to know what that place is. If, on the other 457] hand, at whatever place the ship then is, the risk *is not to attach unless the vessel in fact arrives at the port within a proper time, it is not material to the underwriter at what place the ship then is.

The position is laid down in *Phillips on Insurance*, vol. i, p. 379, s. 690, "that it is an implied understanding that the risk is to commence within a reasonable time, unless the policy contains some express provision on the subject." He elsewhere, vol. i, p. 332, s. 602, expresses a hesitating opinion that a representation, though not embodied in the policy, may have the effect of qualifying or rebutting an understanding that is only implied. As already said, we

(¹) 14 East, 479.

are not called upon to decide how this may be, as in the present case there was neither representation nor express provision in the policy. We think, at all events, in the absence of a representation, that in a policy "at and from a port" it is an implied understanding that the vessel shall be there within such a time that the risk shall not be materially varied, otherwise the risk does not attach.

The rule, therefore, must be discharged.

Rule discharged.

Attorneys for plaintiff: *Flux & Co.*

Attorneys for defendant: *Ashley & Tee.*

[Law Reports, 9 Queen's Bench, 457.]

June 5, 1874.

MULLER V. BALDWIN.

Port Dues—"Coals exported from the Port," Meaning of—35 Vict. c. xiii.

By the Tyne Coal Dues Act, 1872 (35 Vict. c. xiii.), the old coal dues are abolished, and the commissioners are empowered to levy dues, *inter alia*, one penny per ton on "coals exported from the port":

Held, that, in the absence of anything in the act to the contrary, "exported from the port" must be taken to be used in its ordinary meaning of "carried out of the port;" and therefore included coals taken out of the port in a steamer to be consumed on board during a distant voyage.

CASE on appeal from the County Court of Northumberland, holden at Newcastle-on-Tyne.

The following are the material parts of the case:

The action was brought to recover £2 4s. 2d., the amount of *coal dues claimed by defendant, and paid by [458 plaintiff under protest, under the following circumstances:

In 1872 the Tyne Coal Dues Act, 1872 (35 Vict. c. xiii.), was passed; it is entitled "An Act to abolish the Tyne Coal Dues, and in lieu thereof to provide new dues to extinguish the right to increase rates under The Harbors and Passing Tolls Act, 1861, &c."

After reciting the previous acts, 13 & 14 Vict. c. lxiii., and 33 & 34 Vict. c. xc., and that it is expedient that the said dues called the coal dues should be abolished, and that in lieu thereof and in extinction of the right, power and claim of the commissioners under s. 14 of The Harbors and Passing Tolls &c. Act, 1861, to indemnify themselves for the loss of the compensation for differential dues, there should be payable to the commissioners tonnage dues on coals, cinders, coke, grindstones, and salt exported from the port to be called the "River Tyne export dues," it is

enacted by s. 2, the expression "coal dues," means the dues heretofore payable on coals, cinders, grindstones and salt exported from the port.

By s. 3, that on and after the 1st of June, 1872, the coal dues shall be abolished, and in lieu thereof and in extinction of the right, power, or claim by the commissioners under the Harbor and Passing Tolls, &c., Act, 1861, to indemnify themselves for the loss of compensation paid to them for differential dues by raising any of the rates which they have power to levy, there shall be payable to the commissioners in respect of coals, cinders, coke, grindstones and salt, exported from the port, the following dues, that is to say, in respect of coals, cinders and coke, 1*d.* per ton of 20 cwt.; in respect of grindstones, 3*d.* per ton of 20 cwt.; and in respect of salt 1*d.* per ton of 20 cwt.; which dues shall be called "River Tyne export dues," and shall be carried to the account called "The Tyne Improvement Fund," and shall be applicable to all purposes to which the Tyne Improvement Fund shall from time to time be applicable.

On the 19th of April, 1873, a Norwegian steam-vessel called the Hakar Adolstein sailed from the port of Newcastle-on-Tyne with 530 tons of coal, alleged to be bunker coal, or coal for ship's use on board.

459] *The defendant, who was the duly authorized collector of dues for the Tyne Improvement Commissioners, demanded from the plaintiff, who was the master of the steam-vessel, a due of 1*d.* per ton, amounting to the said sum of £2 4*s.* 2*d.* in respect of the said 530 tons of coal. The plaintiff at first refused to pay, upon the ground that the coal was intended solely for ship's use, but afterwards he paid under protest.

It was admitted by the parties that the vessel cleared for the port of Christiania in Norway, taking in goods at Newcastle for New York, and proceeded to Christiania, and from thence, via Bergen, to New York, her ultimate port of destination; that 45 tons of coal would be required for the purpose of navigation from the Tyne to the port of Christiania, and 300 tons for a voyage from Christiania to New York.

Evidence was given of the usage of the port as regards bunker coal, or coal for ships' use, from the year 1840, and it was proved that, with the exception of about ten days in the year 1870, the corporation of Newcastle (to whom the dues were then payable) has never attempted to levy dues on such coal; that at the expiration of those ten days the corporation had stopped the levy, and had returned the sums

paid during those ten days to those who asked for a return ; and that the commissioners had not, until ten months after the passing of the Tyne Coal Dues Act, 1872, attempted to levy dues in respect of such coal ; and it was also proved that dues are not charged on coal used for raising steam in the steam-tugs employed in towing vessels in and out of the harbor.

The judge, having regard to the usage of the corporation up to the year 1870, while the coal dues belonged to them, of treating "bunker" coals as exempted from duty, and considering that "exported" had acquired a secondary meaning of "carried out of the port for commercial purposes," was of opinion that the plaintiff was entitled to recover. But he was also of opinion that the commissioners were entitled to restrict the exemption to such a quantity of coals as shall be reasonably required for the purposes of the ship in each particular case. And the judge gave judgment for the plaintiff for 345 tons, the minimum quantity required *for a voyage to New York, together with 20 per cent. [460 for additional consumption to meet contingencies of the voyage.

Judgment was accordingly given for £1 14s. 6d.

The question for the court was whether the plaintiff was entitled to that or any other sum.

June 2. Sir *J. B. Karlake*, Q.C. (with him *Bruce*), for the defendant, contended that on the true construction of ss. 2 and 3 of the act of 1872, all coal "exported," that is, "taken out" of the port, was liable to duty ; and the defendant was therefore entitled to the verdict.

Manisty, Q.C. (with him *Beresford*), for the plaintiff, contended that "exported" must be taken in the more restrictive sense of exported for the purpose of sale, and for this they referred to the definitions in Richardson's, Webster's, McCulloch's, and Ogilvie's Dictionaries.

Sir *J. B. Karlake*, Q.C., in reply, referred to s. 19 of 18 & 19 Vict. c. 96, the Customs Act, in which, while imposing duties on all spirits "imported or exported" from the Channel Isles, there is an express proviso exempting spirits taken out or brought in on board ship for the ship's use, that is, for the use of the crew or passengers.

Cur. adv. vult.

June 5. The judgment of the court (Mellor, Lush, and Archibald, JJ.), was delivered by

LUSH, J.: The question raised by this appeal is whether coals, taken out of the port of Newcastle in a foreign steamer for the purpose of consumption on board in the course of a

foreign voyage, are liable to the coal dues of one penny per ton, granted to the Tyne Improvement Commissioners by the Tyne Coal Dues Act, 1872, on all coals exported from the port of Newcastle. The learned judge of the county court considered, that, having regard to the usage of the corporation while the coal dues belonged to them of treating coals taken on board for consumption as exempted from duty, the term "exported" must receive a qualified interpretation and be 461] taken to mean coals exported for the purpose *of commerce, as distinguished from what are called "bunker coals," that is, coals taken on board for the purpose of consumption on the voyage. We agree as to the reasonableness of making a distinction between coals taken away for sale and coals taken for the necessary use of the vessel; but we are constrained to differ from the learned judge in his construction of the act. There is nothing in the language of the act to show that the word "exported" was used in any other than its ordinary sense, namely, "carried out of the port;" and considering how easily and how extensively the privilege of storing for use may be abused, and what quantities may be carried away under the name of bunker coals, we think that, if it had been intended to exempt from duty coals taken on board for fuel, some limitation as to quantity would have been imposed. Nothing would have been easier than to insert a proviso to that effect. We cannot, however, speculate upon the intentions of the legislature which are neither expressed in terms nor conveyed by implication; our duty is to interpret the words of a statute according to their plain and grammatical meaning, when, as in this case, they are not controlled by anything to be found in the context. Construing the words of the act upon this principle, we feel bound to hold that coals carried away from the port, not on a temporary excursion, as in a tug or pleasure boat, which intends to return with more or less of the coals on board, and which may be regarded as always constructively within the port, but taken away for the purpose of being wholly consumed beyond the limits of the port, are coals "exported" within the meaning of the act.

We therefore give judgment for the defendant.

Judgment for the defendant.

Attorney for plaintiff: *John Tucker.*

Attorneys for defendant: *Cookson, Wainewright & Pennington, for J. & N. G. Clayton, Newcastle.*

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

HILARY TERM, XXXVII VICTORIA.

[Law Reports, 9 Common Pleas, 208.]

Jan. 14, 1874.

*FREETH and Another v. BURR.

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Contract for Delivery of Goods in Parcels at different Times—Non-payment by Buyer for one Parcel—Refusal by Seller to deliver the Rest.

The defendant contracted to sell to the plaintiffs 250 tons pig-iron at 56s. per ton, half to be delivered in two, remainder in four weeks; payment, net cash fourteen days after delivery of each parcel.

The market was rising, and, notwithstanding urgent demands by the plaintiffs, the delivery of the first 125 tons was not completed for nearly six months. The plaintiffs refused to pay for the first parcel, claiming a right to set off the loss they had sustained from being obliged to procure other iron in consequence of the defendant's default; but they still urged the delivery of the second parcel. The defendant, treating the refusal to pay as a breach and an abandonment of the contract by the plaintiffs, declined to deliver any more. There was no suggestion of inability on the part of the plaintiffs to pay, and the price of the first parcel was ultimately paid:

Held, that the mere refusal to pay for the first parcel did not, under the circumstances, warrant the defendant in treating the contract as abandoned and refusing to deliver the remainder, and that the plaintiffs were entitled to damages for the breach.

THE declaration stated that it was agreed by and between the plaintiffs and the defendant that the defendant should sell and deliver to the plaintiffs and the plaintiffs should buy and accept of and from the defendant 250 tons of pig-iron, at 56s. per ton, to be delivered by the defendant to the plaintiffs; that the defendant delivered to the plaintiffs one half of the said 250 tons of pig-iron, and that all conditions were

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fulfilled, &c., to entitle the plaintiffs to have the agreement fulfilled by the defendant in respect of the matters the breach of which is hereinafter assigned, and to maintain this action: Breach, that the defendant did not nor would deliver to the plaintiffs the residue of the said 250 tons of pig-iron according to the agreement; whereby the plaintiffs had been deprived of the profits which would have accrued to them 209] from the delivery of the same, and had been delayed and otherwise injured and damnified in their business, in which the defendant well knew they intended to use the said goods. Claim, £500.

Pleas, 1. that the defendant did not agree, as alleged; 2. a denial of the alleged breach; 3. that, after the alleged promise, and before any breach thereof by the defendant, the plaintiffs exonerated and discharged the defendant from his promise and from the performance of the same; 4. that, after the making of the alleged contract, and before any breach thereof by him, the said contract was rescinded and abandoned by mutual assent.

Joinder of issue; and further replication to the third plea, that the plaintiffs were suing, not for a breach of the agreement therein admitted, and from the performance of which the defendant alleged that the plaintiffs exonerated and discharged the defendant, but for the breach of another and subsequent agreement by which the defendant agreed to sell and deliver the said iron to the plaintiffs.

There was a similar replication to the fourth plea.

Rejoinders to the second and third replications,—that no such agreement as the supposed other and subsequent agreements in those replications respectively mentioned were made,—that the defendant denied the alleged breaches of the said other and subsequent agreements and every of them, and said that he was not guilty thereof. Issue.

The cause was tried before Brett, J., at the sittings in London after last Hilary Term. The plaintiffs and the defendant were iron-merchants and manufacturers. In November, 1871, the plaintiffs agreed to buy of the defendant 250 tons of pig-iron, and on the 28th of that month bought and sold-notes were exchanged. The bought-note, signed by the plaintiffs, was as follows:

“London, 28th November, 1871.

“Bought of Messrs. D. M. Burr & Co. two hundred and fifty tons of pig-iron, at fifty-six shillings per ton alongside our wharf, Millwall. Half to be delivered in two weeks, re-

- mainder in four weeks. Payment, net cash 14 days after delivery of each parcel."

The market was rising, and early in February the plaintiffs wrote to the defendant remonstrating with him for not having *delivered any of the iron. About the 15th of [210 that month 10½ tons were sent alongside the plaintiffs' wharf; and on the 20th the plaintiffs wrote to the defendant, as follows:

"We are much surprised you should have sent such a paltry lot as 10 tons on account of contract for 250 tons which should have been delivered last December. We must request you will give us a definite time for delivery of at least 50 tons, which must be delivered at once, or we shall have again to buy against you."

On the 17th of May, 1872, the defendant wrote to the plaintiffs, as follows:

"We are informed that the lighter which we sent with 30 tons Kentledge pig-iron to your wharf on the 10th instant is still lying there unloaded, and that this has arisen through an undue preference being allowed by you to other barges in discharging, or from some other cause for which you are to blame. We have, therefore, to intimate that we shall hold you liable for demurrage from and after 13th instant."

On the 18th the plaintiffs wrote to the defendant,—"In answer to yours of the 17th instant, your barge has been discharged some days. Do you intend to deliver the remainder, or shall we buy against you?"

To this the defendant replied on the 21st,—"It is our intention to deliver remainder of pig-iron, and do not wish you to buy against us. We enclose invoice of last lot."

On the 29th of May, 126 tons in all having by that time been delivered, the defendant wrote to the plaintiffs,—"Would you kindly forward us check in payment of the ballast iron we have delivered to you, and we shall proceed at once to send on the remainder."

The plaintiffs, under an erroneous impression that they were entitled to set off against the defendant's claim any loss which they might incur in case the defendant should fail to deliver the remainder of the iron contracted for, refused to pay for the 125 or 126 tons which had been delivered; and their attorney, in reply to a letter from the defendant's attorney demanding payment, put forward a claim for £250, being £2 per ton on the 125 tons undelivered.

On the 12th of June, the defendant's attorneys wrote

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211] to the *plaintiffs' attorney,—“We hardly think it necessary to refer to your clients' claim for £250, as it is purely hypothetical and could not possibly arise, as your clients by their own default have obliged our client to refuse to make any further delivery of iron. We must request your clients' immediate attention to the settlement of amount (£352 15s. 10d.) mentioned in our letter of the 5th instant.”

The plaintiffs paid ultimately (but not until after an action had been brought for it) for the first 125 tons of iron; and this action was brought against the defendant for the breach of his contract in refusing to deliver the second 125 tons.

On the part of the defendant, it was contended that the plaintiffs' refusal to pay for the first parcel of the iron amounted to an abandonment of the contract by them, and absolved the defendant from his obligation further to perform it on his part. *Hoare v. Rennie* (') was relied on.

The learned judge ruled that the mere refusal by the plaintiffs to pay for the first 125 tons did not exonerate the defendant from his obligation under the contract to deliver the second 125 tons, and consequently that the plaintiffs were entitled to recover such damages as they had sustained from the non-delivery; and he directed a verdict to be entered for the plaintiffs for £148 16s.,—reserving leave to the defendant to move to enter a nonsuit, if the court should be of opinion that the refusal by the plaintiffs to pay for the iron delivered amounted to an abandonment of the contract.

Garth, Q.C., in Easter Term last, obtained a rule *nisi* accordingly.

Watkin Williams, Q.C., and *E. Clarke*, who appeared to show cause, were stopped by the court.

Garth, Q.C., and *Philbrick*, in support of the rule: The iron was not delivered according to the strict terms of the contract: but the correspondence shows that the time for delivery had been extended by mutual consent. The whole of the first parcel having been delivered, the defendant was entitled to payment for that parcel in fourteen days. Pay-212] ment was demanded and refused. *The defendant had then a right, according to the principle laid down in *Hoare v. Rennie* ('), to treat that refusal as a breach, and to rescind the contract. In that case the plaintiffs had undertaken to deliver to the defendants 667 tons of iron, to be shipped from Sweden in the months of June, July, August,

(') 5 H. & N., 19; 29 L. J. (Ex.), 19.

and September, and in about equal portions each month. In June the plaintiffs delivered twenty-one tons only; whereupon the defendants gave them notice that they would receive no more; and the Court of Exchequer held that they were justified in considering the contract as at an end. Pollock, C.B., in delivering judgment, said: "At the outset, the plaintiffs failed to tender the quantity according to the contract: they tendered a much less quantity. The defendants had a right to say that this was no performance of the contract, and they were no more bound to accept the short quantity than if a single delivery had been contracted for." So, here, the non-performance by the plaintiffs of the stipulation as to payment for the first parcel entitled the defendant to assume that they repudiated the contract. In *Withers v. Reynolds* (*), the refusal by the buyer to perform his part of the contract by paying for each load of straw as delivered, was held to entitle the seller to rescind the contract.

[DENMAN, J.: There the plaintiff did acts and said things which amounted to a declaration on his part that he did not mean to perform the contract.]

Hoare v. Rennie (*) was distinctly recognized in *Bradford v. Williams* (*), though somewhat reflected upon in *Simpson v. Crippin* (*).

[DENMAN, J., referred to *Jonasshon v. Young* (*).]

LORD COLERIDGE, C.J.: The question in this case arises upon a contract for the sale of iron entered into between the plaintiffs and the defendant on the 28th of November, 1871, in the following terms: "Bought of Messrs. D. M. Burr & Co. 250 tons of pig-iron, at 58s. per ton alongside our wharf, Millwall. Half to be delivered in two weeks, remainder in four weeks. Payment, net *cash fourteen days after [213 delivery of each parcel." The material facts were these: There was no delivery in the terms of the contract of either parcel of the iron. In point of fact, the delivery of the first 125 tons was by mutual arrangement delayed, and the last delivery of that parcel did not take place until the 12th of May, 1872. There was a correspondence between the parties, pressure by the purchasers for delivery, and excuses by the vendor for the non-delivery. That the former were anxious for the completion of the contract appears to be clear, as well from the tenor of the correspondence as from the fact that the market was rising. A few days after the

(1) 2 B. & Ad., 882.

(2) 5 H. & N., 19; 29 L. J. (Ex.), 19.

(3) Law Rep., 7 Ex., 259.

(4) Law Rep., 8 Q. B., 14.

(5) 4 B. & S., 296; 32 L. J. (Q.B.), 385.

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full delivery of the first parcel, viz. on the 29th of May, 1872, the defendant demanded payment for the 125 tons, which the plaintiffs refused, claiming to set off damages for the defendant's breach of contract. The plaintiffs afterwards demanded delivery of the remaining 125 tons; and upon the defendant's refusal to comply with that demand this action was brought. The question is whether the fact of the plaintiffs' refusal to pay for the 125 tons delivered was such a refusal on the part of the purchasers to comply with their part of the contract as to set the seller free and to justify his refusal to continue to perform it. This certainly appears, viz. that there was an extension by mutual consent of the time for the delivery of the iron from December, 1871, to May, 1872, with constant pressure on the one side and excuses and resistance on the other. I mention that because it is important to express my view that, in cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, viz. that the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other [214] party free. *That is the true principle on which *Hoare v. Rennie* (*) was decided, whether rightly or not upon the facts, I will not presume to say. Where by the non-delivery of part of the thing contracted for the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract. That is the ground upon which it is said in *Jonasshon v. Young* (†) that that case may be supported. In *Withers v. Reynolds* (‡) there was an express refusal by the plaintiff to perform the contract: and Patteson, J., says: "If the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw: but the plaintiff here expressly refuses to pay for the loads as delivered; the

(†) 5 H. & N., 19; 29 L. J. (Ex.), 19.

(‡) 4 B. & S., 296; 32 L. J. (Q.B.), 385.

(§) 2 B. & Ad., 882.

defendant, therefore, is not liable for ceasing to perform his part of the contract." Wightman, J., certainly, and Crompton, J., by inference, in *Jonasshon v. Young* ⁽¹⁾, both uphold that case upon the principle on which I rely. The principle to be applied in these cases is, whether the non-delivery or the non-payment amounts to an abandonment of the contract or a refusal to perform it on the part of the person so making default. That being so, and my Brother Brett having ruled that the mere non-payment for the first portion of the iron contracted for, unattended by any other act on the part of the purchaser, did not put an end to the contract so as to disentitle the purchasers to maintain an action for the non-delivery of the second portion, but only gave the seller a remedy by cross-action (of which he has availed himself), I am of opinion that his ruling was correct, and that the rule should be discharged.

KEATING, J.: I entirely agree in the judgment pronounced by my lord, and in the principle upon which he puts it. It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do, that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his part of the contract. Non-payment is an element. But, looking at all the circumstances of this case,—a rising market; *a [215 failure on the part of the defendant to deliver the iron according to the terms of the contract; a series of deliveries in small quantities long after the times for delivery provided for by the contract; and a refusal on the part of the plaintiffs to pay for the iron delivered, not only accompanied by remonstrances, but with a requisition to the seller to fix a day for the delivery of a certain quantity;—I do not think they show an intention on the part of the plaintiffs to abandon the contract. As upon the facts there appears to have been not only no absolute refusal to perform the contract by the plaintiffs, and, what is important, no evidence of inability on their part to perform it, I think the defendant had no right to treat the contract as rescinded and to refuse to deliver the remainder of the iron.

DENMAN, J.: I am of the same opinion. The learned judge ruled that the mere refusal by the plaintiffs to pay for the portion of the iron delivered did not warrant the defendant in considering the contract as at an end; and he gave the defendant leave to move to enter a verdict or a nonsuit if the court should think that ruling wrong. I am of opinion, upon the authority of *Withers v. Reynolds* ⁽²⁾,

⁽¹⁾ 4 B. & S., at p. 299.

⁽²⁾ 2 B. & Ad., 882.

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that the ruling was quite right. That case did not decide expressly that a mere failure of a single payment might not be evidence of a refusal to perform the contract. But, in the words of Patteson, J., the conduct of the plaintiff, coupled with the non-payment, amounted to an express refusal to perform the contract on his part. There was nothing of the sort here. After the way in which that case has been treated in subsequent authorities, I think we are bound to hold it to be a correct statement of the law, and to act upon it. Notwithstanding the plaintiffs' refusal to pay, the defendant was bound to go on and deliver the rest of the iron.

Rule discharged.

Attorneys for plaintiffs: *Payne & Nelson.*

Attorneys for defendant: *Evans & Co.*

[Law Reports, 9 Common Pleas, 273.]

November 21, 1878.

273] *FORD, Appellant; HART, Respondent.

Parliament—Borough Vote—Freeman—Residence—Reform Act (2 Wm. 4, c. 45), s. 32.

The claimant, a freeman of a borough, was an officer in the army serving with his regiment. When he obtained leave of absence, which he usually did for three months in the year, he used to reside at the house of his mother, within seven miles of the borough, occupying apartments there, which were always reserved for his use. He was unmarried, and had no other home than his mother's house:

Held, that in the case of an officer subject to the will and pleasure of the Queen, and who was therefore not *sui juris*, there could not be such an intention of returning as to constitute a constructive residence, and consequently that the claimant was not qualified.

Rea v. Mitchell (10 East, 511) discussed.

APPEAL from the decision of the revising barrister for the city of Exeter.

Objection had been duly made to the name of the respondent being retained on the list of voters for the city of Exeter.

The respondent was a duly admitted freeman of the city.

He was, and had been for several years, an officer in the army, and, except when on leave of absence, was stationed with his regiment more than seven miles from the city of Exeter.

The respondent's mother, a widow, lived within seven miles of the city of Exeter, and previously to respondent's entering the army, and since he had been in the army whenever he obtained leave of absence from his regiment, he had lived with his mother in her house. The respondent had

usually obtained leave of absence three months in each year, and was in fact living with his mother in Exeter during the three months of January, February, and March in the year 1873. His mother had set apart two rooms in her house, one being a sleeping apartment, for the use of the respondent, in which some of his clothes and other property remained while he was with his regiment, and no other person slept in or made any use of the rooms while he was away.

The rooms were so set apart for the exclusive use of the respondent during the whole of the six months preceding the 31st of July, 1873; and the respondent had during the whole of such *time his mother's permission to occupy [274] the rooms whenever he wished. He was not married, and had no home except the house of his mother and his rooms in the barracks at which his regiment was stationed for the time being.

It was objected that the voter had no residence within the borough, or seven miles thereof.

The revising barrister decided that the respondent continued to form part of his mother's family, and that he resided with her during the whole of the six months preceding the 31st of July, 1873.

The question for the court was, whether, consistently with the facts above stated, the revising barrister could legally find the respondent to have so resided.

Kingdon, Q.C., for the appellant: There was no actual residence in the present case, and it is submitted that there was no constructive residence. The respondent could only return to his mother's residence by her permission, which might or might not be given on any particular occasion when he wished to return. He had, in fact, no settled home. The reason for requiring residence was, that the voter might have a substantial interest in the place, and a knowledge of its wants. Secondly, the respondent was an officer, and as such subject to the Queen's will and pleasure. He could not absent himself from his duties for any period of time without leave, and might be ordered anywhere for any length of time. He never had more than three months' leave of absence in a year. How is it possible under those circumstances to hold that he constructively resided for the last six months of the qualifying year in Exeter? *Rex v. Mitchell* (*) is distinguishable, because militiamen are not called out for more than a short period; and service is the exception, not the rule, of their lives. [He also cited *Bond v. Overseers of St. George's Hanover Square* (*).]

(*) 10 East, 511.

(*) Law Rep., 6 C. P., 312.

The respondent did not appear.

KEATING, J.: In this case I am of opinion that the decision of the revising barrister was wrong, and that the right to vote was not established. It seems to me, that according [275] to the correct *rule of law with regard to residence to be derived from the authorities on the subject, the respondent had not resided for the six months prior to the 31st of July in the borough or within seven miles thereof. I am by no means disposed to say that in ordinary cases a residence such as existed in the present case, even though it is in some sense permissive, may not be a sufficient residence for the purpose of entitling a freeman to vote; but it seems to me that the position of the respondent was peculiar. Being an officer in the Queen's service he was no longer a free agent. He could not move about at his own will and pleasure or otherwise than according to the will of the Queen expressed through his superior officer. He could not return within the borough without the leave of his commanding officer. He has usually had three months' leave in a year, no doubt, but he might, under some circumstances, have none at all. He is no longer *sui juris*, and has voluntarily incapacitated himself from returning to his mother's house at his own pleasure. The case of *Rex v. Mitchell* (*) no doubt seems at first sight an authority in favor of the respondent; but the question there was, whether the persons claiming to vote could be said to be inhabitants under the charter of the borough. They had been absent, being in the militia; but they had houses in the borough in which their families resided during their absence. The court held that they were inhabitants. The present, however, is a question of residence, and we must be governed in our decision by the decisions with regard to residence. I am not aware that there is any case in which it has been held that there can be constructive residence, when the party has voluntarily incapacitated himself from returning to the borough at his own will.

BRETT, J.: I am of the same opinion. What is the effect of the rule laid down in *Powell v. Guest* (*) when applied to the present case? To constitute constructive residence, the claimant must have the liberty of returning and also the intention of returning whenever he pleases. Here the respondent was actually living, and sleeping, and doing all [276] that constitutes residence more *than seven miles from the borough at the barracks. Therefore he did not in fact reside at his mother's house. Then was there a constructive residence according to the rule laid down by Erle, C.J.? I

(*) 10 East, 511.

(*) 18 C. B. (N.S.), 72; 34 L. J. (C.P.), 69.

do not assent to Mr. Kingdon's argument that there was no such residence, because the mother might have withdrawn her permission. Such permission did, in fact, exist during the whole of the six months. But can it be said that there was an intention to return in the sense in which it is necessary to constitute constructive residence? When it is stated that the respondent is an officer of the army we must take notice of the law as applicable to such, viz. that though they do customarily get leave of absence, they cannot without the leave of the Queen, expressed through the commanding officer, be absent for a day. The respondent voluntarily put himself into the position of not being able to return to the city of Exeter when he pleased. When the person in fact lives elsewhere, and cannot, by law, return to the borough without permission of another, it seems to me impossible to say that there is an intention to return within the meaning of the terms as applied to the doctrine of constructive residence. To make a comparison, which is perhaps hardly seemly as applied to an officer doing his duty in the Queen's service, but which aptly illustrates my meaning, it has been held that a man who commits an offence and thereby subjects himself to imprisonment, though no doubt he would be very glad to return to his former place of residence, yet, inasmuch as he has voluntarily placed himself under the circumstances which led to his restraint, cannot be said to have an intention of returning⁽¹⁾. Thus, in the present case, not by crime, but by the voluntary acceptance of a duty, the respondent has incapacitated himself from returning to the city of Exeter. The only decision which raises any difficulty in my mind is *Rex v. Mitchell*⁽²⁾. But that arose upon different words from those which govern the present case. Here the question is, whether, under s. 32 of the Reform Act, there has been a sufficient residence. There the question was, whether there was a right to vote as an inhabitant under a charter. As I understand that case, it was held that on the proper construction of the charter a person might be an *inhabitant without dwelling in [277 the borough. Inasmuch as he had his house and establishment there and his family, it was considered that he was what would be generally meant by an inhabitant, and would be commonly called so, and so was within the meaning of the charter. It does not appear to me that that case can govern the construction of the act we are now considering.

DENMAN, J.: My Brother Grove requested me to say that he agrees with the rest of the court, but he thinks it very

(1) See *Powell v. Guent*, 18 C. B. (N.S.), 72; 84 L. J. (C.P.), 69. (2) 10 East, 511.

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unsatisfactory to have to decide these questions without argument on both sides (¹). I also agree that the respondent cannot succeed. The authorities no doubt show that there may be a constructive residence where there is no actual residence, but it seems to me that the residence attempted to be set up here does not amount to a constructive residence.

Decision reversed.

Attorney for appellant: *Elliott Fox*.

(¹) Grove, J., was present during the argument, but had left the court before judgment was pronounced.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

EASTER TERM, XXXVII VICTORIA.

[Law Reports, 9 Common Pleas, 811.]

April 21, 1874.

*STEWART v. EDDOWES and Another. [311]

HUDSON and Others v. STEWART.

Sale of Goods—Statute of Frauds—Alteration of Written Contract by Parol.

A memorandum containing proposed terms for the sale of a ship having been drawn up by the vendors' broker, but not signed, was sent to the purchaser. He made certain interlineations in red ink altering the terms, and having signed the document, returned it to the vendors' broker. The alterations were subsequently not acquiesced in by the vendors, and were struck out, and further interlineations were made by the vendors. The vendors' broker then signed the document and submitted it to the purchaser, who assented to the terms of it as it then stood:

Held, in an action on a contract in the last-mentioned terms against the purchaser, that, notwithstanding the provisions of the Statute of Frauds, parol evidence was admissible to show that the purchaser had so assented, inasmuch as there never had been a contract between the parties until such assent on his part; and the effect of the parol evidence was, therefore, not to vary a written contract, but merely to show what was the condition of the document when it became a contract between the parties.

THE declaration in the first action was for money received by the defendants for the use of the plaintiff.

Plea: Never indebted.

The declaration in the second action was upon an agreement for *the sale of a ship called the Amsterdam by [312] the plaintiffs to the defendant, for the non-payment by the defendant of the balance of the purchase money of the said ship.

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Plea (*inter alia*), denying the agreement. Issues.

The trial took place before Amphlett, B., at the Liverpool Spring Assizes, when the facts, so far as at present material, appeared to be as follows:

Stewart, the plaintiff in the first action and defendant in the second, who was a merchant and shipowner at Liverpool, had entered into negotiations with the plaintiffs in the second action for the sale of the Amsterdam by the latter to the former. Messrs. Eddowes, the defendants in the first action were shipbrokers at Liverpool, who had acted as agents for the vendors there. The first action was brought to recover a deposit paid upon the purchase-money of the ship to Messrs. Eddowes by Stewart, and the second to recover the balance of the purchase-money. It appeared that a memorandum containing suggested terms for the sale of the ship, was drawn up by Messrs. Eddowes and sent to Stewart, unsigned, for approval. Stewart made certain alterations by interlineations in red ink, and signed the document as altered. He then took it back to one of the Messrs. Eddowes, who told him that it would be useless to forward it to the vendors as altered, for it would never be agreed to. The interlineations were then struck out with Stewart's consent, and the document sent to Glasgow to the vendors for their approval. The vendors made some further interlineations, and sent it back to Liverpool. Eddowes then signed it on behalf of the vendors, and took it to Stewart, who acquiesced in the alterations made by the vendors, and approved of the agreement as signed by Eddowes.

On these facts it was objected by the counsel for Stewart, that the parol evidence to show that Stewart had acquiesced in the alterations made in the contract after he had signed it was inadmissible by reason of the 17th section of the Statute of Frauds. The evidence was admitted, and the verdict was entered against Stewart in both sections.

Benjamin, Q.C. (*Baylis* with him), moved for a new trial, 313] on the ground that the parol evidence was improperly received. There was no sufficient memorandum of the contract sued upon within the Statute of Frauds, various alterations having been made after the defendant Stewart signed. It has been frequently decided that parol evidence cannot be admitted to vary a written contract for the sale of goods within the statute: *Goss v. Lord Nugent* (1); *Moore v. Campbell* (2); *Noble v. Ward* (3).

(1) 5 B. & Ad., 58.

(2) 10 Ex., 323; 23 L. J. (Ex.), 310.

(3) Law Rep., 1 Ex., 117; 2 Ex., 135.

[BRETT, J.: It is quite true that you cannot alter the contract by parol, because that would be an infringement of the statute; but evidence is admissible to show what it is that the parties meant their signatures to apply to when the document became an agreement.

LORD COLERIDGE, C.J.: All the cases you have cited are no doubt authorities to show that the contract once made cannot be varied by parol; but here there never was a contract until Stewart assented to the alterations. The evidence given is as to the state of the document when it became a contract.]

All the mischief which the statute was intended to prevent is admitted if the document may be altered to any extent after one party has signed and parol evidence given of his assent to such alteration.

[LORD COLERIDGE, C.J.: There may be a fallacy involved in the use of the word "signature." It may mean the mere physical act of writing a name, or the legally binding act of agreement. It is clear in this case, that at the time Stewart actually wrote his name there was no binding agreement.]

The provisions of the 17th section of the statute are not complied with if parol evidence is necessary to couple the signature with the terms actually agreed upon.

LORD COLERIDGE, C.J.: I am of opinion that there should be no rule. The facts of the case appear to have been as follows: A memorandum of agreement was drawn up in a certain shape, neither party having signed it. Stewart inserts certain interlineations in red ink and then signs it. He then takes it to the *defendant Eddowes, who is the [314 representative of the proposed vendors in the matter. Eddowes tells Stewart that it is useless to send the proposal in that form as the vendors would never agree to it. The interlineations are then struck out, and the document is sent to Glasgow for acceptance by the vendors. There Hudson makes some further interlineations, and acquiesces in the proposals so altered, and with the former interlineations struck out. It is then sent back to Liverpool to Eddowes, who signs it and takes it to Stewart, and informs him that the proposal, with the interlineations made by him struck out and the others put in it, is the agreement that he, Eddowes, is prepared to accept on behalf of the vendors if Stewart will accept it, and Stewart says that he will. It is now suggested that evidence is not admissible to show that Stewart acquiesced in the striking out of the interlineations

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in red ink or the insertion of the others, on the ground that that would be to vary the contract by parol. This contention appears to me to be a fallacy. There was no variation of the contract, for there was no contract between the parties until the proposal was submitted to Stewart, and Stewart on meeting Eddowes agreed that his handwriting should operate as a signature to what then became a complete agreement between the parties. There was no evidence to vary the terms after the agreement became an agreement, but only evidence to show what the agreement was to which the parties agreed when they signed or acknowledged their signatures. When the facts are looked to, it appears that there never was an agreement until the document took the shape in which it now appears.

BRETT, J.: In this case the vendors relied on a written agreement, and produced a paper at the bottom of which the name of Mr. Stewart was written as a signature. If the document was to be taken as it then appeared, it was conclusive against Stewart; but it was alleged on his behalf, that the paper was not in the condition in which it appeared at the time when it became an agreement; the interlineations in red ink had not been struck out when he signed it. To that it is replied by Eddowes, that though that was the case, 315] at the time when Stewart signed *there was no agreement, but that afterwards it was agreed by Stewart that the paper in its present condition should be the agreement signed by him. It is true that a written agreement cannot be varied by parol. If by that is meant that you cannot show that the document was different in any respect from that which it appears to be at the trial, Mr. Benjamin's argument must fail. But it is clear that the real point of time to look at with respect to the condition of the document is the time when it became an agreement. Any previous alteration does not come within the rule which forbids the alteration of a written document, for such an alteration is merely the alteration of a proposal for an agreement. Here, when the document was first written, it was a mere proposal; when it was given to Eddowes and sent to Glasgow it was a mere proposal; when it came back to Liverpool it was a counter-proposal only. There was no agreement until Eddowes and Stewart met and agreed that the signatures should be signatures to the agreement. The evidence here was admissible to show, not what was agreed to, but what was the condition of the paper when the parties agreed that it should be an agreement between them.

DENMAN, J.: I am of the same opinion. This was not evidence to alter an agreement already made between the parties, but merely of what the condition of the document was when it became an agreement between them.

Rule refused.

Attorneys for *Stewart*: *Gregory & Rowcliffe*, for *Hull, Stone & Fletcher*.

[Law Reports, 9 Common Pleas, 316.]

April 18, 1874.

***HAMMOND V. THE VESTRY OF ST. PANCRAS. [316]**

Negligence—Metropolis Local Management Act, 18 & 19 Vict. c. 120—Liability of Vestry or Local Board for injury resulting from insufficient Cleansing of Sewers.

In the absence of negligence on their part, a vestry or local board is not responsible for any injury resulting to an individual from the disrepair of a sewer.

Sect. 72 of the Metropolis Local Management Act (18 & 19 Vict. c. 120) imposes upon the vestry or local board the duty of properly cleansing the sewers vested in them by the act. Under the premises of the plaintiff was an old drain which by reason of other houses draining into it had become a "sewer." This drain having become choked, the soil therefrom flowed into the cellar of the plaintiff, a publican, and did damage. In an action against the vestry, founded upon a breach of the duty imposed upon them by s. 72, but not charging negligence, the jury found that the existence of the drain was unknown to the defendants; that its existence might have been known to them by the exercise of reasonable care and inquiry; but that the obstruction of the drain was unknown to the defendants, and could not by the exercise of reasonable care have been known to them:

Held, that, upon these findings, the defendants were entitled to the verdict; and that the declaration disclosed no cause of action.

DECLARATION, that, at the time of the committing of the grievances hereinafter mentioned, a certain sewer and barrel drain were vested in the defendants, and the plaintiff was possessed of premises near thereto, and the defendants did not keep the said sewer and barrel drain properly cleansed, whereby they became choked up and overflowed with foul water and other filth, which flowed into and over the premises of the plaintiff, whereby the said premises were much injured, together with certain plant, tools, utensils, cellar pipes, stock in trade, and goods of the plaintiff then being in and near the said premises, and the plaintiff lost the use and enjoyment of the same, and whereby the plaintiff suffered much damage through loss of trade, and whereby the plaintiff was much injured in his health and incurred expense for medicine and medical and surgical attendance: Claim, £300.

Pleas: 1. Not guilty (by statute 25 & 26 Vict. c. 102,
9 ENG. REP. 52

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Public Act, s. 106); 2. That the said sewer and barrel drain were not vested in the defendants as alleged. Issue thereon.

The cause was tried before Bovill, C.J., at the sittings at Westminster after last Trinity Term. The facts were as follows: The plaintiff is the keeper of a public-house called The 317] Elephant and *Castle, in the King's Road, St. Pancras. Under the plaintiff's premises and in the yard attached thereto was a brick drain, which, though originally a private drain, had by reason of two other houses having been drained into it become a "sewer." The existence of this drain was unknown to the defendants' surveyor, nor had any notice of the alteration been given to him. The drain having by some means (the action of rats or natural decay) got out of repair and become choked up, the soil overflowed into the plaintiff's cellar and did damage.

There was evidence that the stoppage of the brick drain was probably occasioned by rats, and also that the barrel drain in the public road, into which the brick drain should have emptied itself, was free from obstruction.

It was submitted on the part of the plaintiff that the 72d section of the Metropolis Local Management Act (18 & 19 Vict. c. 120) having imposed upon the vestry the duty of cleansing and keeping cleansed all the sewers vested in them by s. 68, they were liable for all the consequences of a failure on their part to perform that obligation. For the defendants it was insisted that the only duty imposed upon the vestry was, to use all reasonable care and diligence in the performance of the works entrusted to them; and that if damage resulted to an individual without any negligence on their part, they were not responsible for it.

His lordship left the following questions to the jury:

Was the barrel drain a "sewer?" Answer: Yes.

Was the brick drain a "sewer?" Answer: Yes.

Were both, or either, and which, stopped up? Answer: The brick drain was stopped, and not the barrel drain.

Was the barrel drain known to the vestry? Answer: Yes.

Was the brick drain known to them? Answer: No.

Might it have been ascertained and known by exercise of reasonable care and inquiry? Answer: Yes.

Was the obstruction known before the injury occurred? Answer: No.

Could it have been known by reasonable care that it was obstructed? Answer: No.

A verdict was thereupon entered for the plaintiff for £50 318] (the *damages assessed by the jury), and leave was

reserved to the defendants to move to enter a verdict for them if the court should be of opinion that, upon the evidence given and upon these findings, no liability attached to the defendants.

Sir *Henry James, A.-G.*, in Michaelmas Term last, obtained a rule *nisi* accordingly, and also to arrest the judgment, on the ground that the declaration disclosed no cause of action.

April 16. *Powell, Q.C.*, showed cause: The question turns upon the construction of some sections of the Metropolis Local Management Act, 18 & 19 Vict. c. 120. By s. 68, all sewers, except the main sewers of the metropolis referred to in sched. D., are vested in the several vestries and district boards, who by s. 69 are bound to repair and maintain them. Sect. 72 enacts that every vestry and district board shall "cause the sewers vested in them to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied; and, for the purpose of clearing, cleansing, and emptying the same, they may construct and place, either above or under ground, such reservoirs, sluices, engines, and other works as may be necessary." Sections 77 and 78 contain provisions for branching drains into sewers. Sect. 82 empowers the vestry or district board to authorize inspection of drains, privies, and cesspools; and s. 85 to cause them to be put into proper condition where necessary. And by s. 125 the vestry or district board is empowered "to appoint and employ a sufficient number of persons," amongst other things, "for the cleansing out and emptying privies and cesspools, sewers, and drains in or under houses and places within their parish or district." The brick drain in question is a sewer ⁽¹⁾ which by the act of Parlia- [319 ment is vested in the defendants; and it became their duty to see that it was cleansed and kept in a proper condition. As the jury have found that this duty was neglected, and that the defendants might, if they had exercised reasonable care, have known that the state of things existed which caused the injury to the plaintiff, they are liable in damages.

(1) Sect. 201, the interpretation clause, provides that "the word *Drain* shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different

persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board; and the word *Sewer* shall mean and include sewers and drains of every description except drains to which the word '*Drain*,' interpreted as aforesaid, applies."

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The sewers being under their sole control, they are bound to inquire and to keep them in proper working order. Having failed in the performance of a statutory obligation, and damage having resulted therefrom to the plaintiff, they are clearly liable: *Meek v. Whitechapel Board of Works* ⁽¹⁾. It was proposed there to prove that the plaintiff himself contributed to the mischief by throwing refuse into the gutter, which helped to stop up the sewer. But Wilde, B., said: "The evidence is no doubt *admissible* under not guilty; but it would be of no avail unless it connects the wrongful act of the plaintiff with the breach of duty complained of on the part of the defendants: and, looking at the provisions of the act, it hardly appears that the defence can be sustained. They (the board) have powers to enforce the removal of any refuse, by whomsoever caused, by neglect of scavengers or by act of occupiers. And the very breach of duty charged is, not acting on those powers." And he left this question to the jury,—“Was the overflow caused by neglect of the defendants in not causing the sewers to be kept cleansed, or by a storm so sudden that no reasonable care could provide against it?” And the jury found for the plaintiff.

[BRETT, J., referred to *Wilson v. Mayor, &c., of Halifax* ⁽²⁾.]

There was no *obligation* to fence there, as there is here to cleanse, under s. 72.

BRETT, J., referred to *Whitehouse v. Birmingham Canal Co.* ⁽³⁾.]

There, there was no negligence, and no duty. The defendants inefficiently performed a public work which the act of Parliament authorized them to perform. Here, however, the defendants have omitted to do something which the act requires them to do. The claim rests upon a breach of duty.

[BRETT, J., referred to *Brown v. Sargent* ⁽⁴⁾.]

Sir Henry James, Q.C., and Beasley, in support of the 320] rule: *There is no case to be found where a public board has been held liable to an action under circumstances like the present. The plaintiff is in effect seeking to cast upon the defendants the duty of cleansing a drain or sewer of the existence of which they had no knowledge, and in reference to which it is not found that they have been guilty of any negligence. The only duty cast upon them by the statute is, to use due and reasonable care to keep the sewers which are under their management and of which they have cogni-

⁽¹⁾ 2 F. & F., 144.

⁽²⁾ Law Rep., 3 Ex., 114.

⁽³⁾ 27 L. J. (Ex.), 25.

⁽⁴⁾ 1 F. & F., 112.

zance in a proper and serviceable condition. Unless the vestry or their officers had the means of knowing the imperfect state of the sewer in question, and were negligently or wilfully ignorant of it,—as was put by Pollock, C.B., and approved of by the House of Lords, in *Mersey Docks v. Penhallow* (¹),—they are not responsible. The real question is whether the defendants have been guilty of negligence in the performance of a duty imposed upon them by the statute: and this the jury have distinctly negatived. In Com. Dig. *Action upon the Case for Misfeasance* (B.), it is said: “An action upon the case does not lie, where a man has not sufficient notice of his duty.” The 82d section of the statute, which authorizes the inspection of drains, &c., by the vestry or board, presupposes that they have knowledge of the existence and position of the thing to be inspected.

Sutton v. Clarke (²), *Whitehouse v. Fellowes* (³), and *Redhead v. Midland Ry. Co.* (⁴), were also cited.

Curr. adv. vult.

April 18. BRETT, J.: This rule was argued on Thursday last before my Brother Denman and myself. It was an action against the vestry of St. Pancras for damage sustained by the plaintiff, a publican residing in their district, in consequence of sewage matter having escaped from a sewer under their management into his cellar: and the action was sought to be maintained upon s. 72 of the Metropolis Local Management Act, 18 & 19 Vict. c. 120. It was contended on behalf of the plaintiff that that section imposed upon the defendants an absolute duty to keep the sewers properly *cleared, cleansed, and emptied, and [321] that, by reason of their neglect of that duty the overflow complained of ensued. On the part of the defendants it was insisted that s. 72 does not impose upon the vestry or district board an absolute duty to keep the sewers cleansed at all events, but only the duty of using all reasonable care and diligence to keep them in a proper and serviceable condition; and that, if a sewer be foul and uncleansed, but without any want of reasonable care and diligence on the part of the vestry, if they have done all that careful and prudent men could do, they are not liable for the consequences. At the trial a verdict passed for the plaintiff for £50, but leave was reserved to the defendants to move to enter a nonsuit if the court should be of opinion that, upon

(¹) Law Rep., 1 H. L., 98, 96.

(²) 6 Taunt., 29.

(³) 10 C. B. (N.S.), 765; 30 L. J. (C.P.),

306.

(⁴) Law Rep., 2 Q. B., 412; in error, Law Rep., 4 Q. B., 879.

the evidence and on the findings of the jury, no liability attached to them. A rule *nisi* was obtained in pursuance of that leave, and also to arrest the judgment on the ground that the declaration disclosed no cause of action, negligence not being charged. Now, the material findings of the jury were, that a brick drain which passed under or near to the plaintiff's premises was stopped, but that the barrel drain in the street was not stopped; that the barrel drain was known to the vestry, but that the brick drain was not; that the existence of the brick drain might have been ascertained and known by the exercise of reasonable care and inquiry; that the fact that the brick drain was obstructed was not known to the defendants before the injury accrued; and that they could not by the exercise of reasonable care have known that it was obstructed.

It was contended on the part of the defendants that the fact that the brick drain existed was unknown to them absolved them from responsibility. But that seems to me to be answered by the finding of the jury that they might have ascertained its existence by the exercise of reasonable care and inquiry. Ignorance under the circumstances cannot excuse them. I think the case must stand as if the vestry had knowledge of the existence of the brick drain. Upon the facts and the findings we must assume that the brick drain was a "sewer;" and therefore we must take it that the defendants knew of the brick drain, and that the injury to the plaintiff happened through its not having been properly cleansed. Now, if the 72d section does throw upon the 322] defendants an *absolute duty or obligation to guarantee that the sewers shall be at all times kept cleansed, it follows that, if any injury arises to an individual from their not being so kept, the vestry are liable. The question therefore is, what is the proper construction of the act of Parliament. That, as it seems to me, will dispose of both points; for, both turn upon the construction of s. 72. The declaration does not charge the defendants with having been guilty of negligence. It discloses no common-law liability in the defendants, and can only be a valid declaration if it can be supported upon the statute. The words of s. 72 are susceptible of either meaning,—that an absolute duty is cast upon the defendants, or that they are only bound to exercise due and reasonable care. What, then, is the proper rule of interpretation? The defendants are a public body having a duty imposed upon them by Parliament to do a thing which even with the exercise of the utmost care and diligence may not always be capable of being done. It is obvious that cir-

cumstances may arise in which a sewer notwithstanding the exercise of reasonable care may be obstructed. The terms of the finding in this case assume that. The jury find in effect that the brick drain was obstructed, but that the obstruction was not known to the defendants and could not by the exercise of reasonable care have been known to them.

It would seem to me to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care and skill could obviate. The duty may notwithstanding be absolute: but, if so, it ought to be imposed in the clearest possible terms. The intention of the legislature is to be gathered from the language used and the subject-matter. Where the language used is consistent with either view, it ought not to be so construed as to inflict a liability, unless the party sought to be charged has been wanting in the exercise of due and reasonable care in the performance of the duty imposed. According to my view of s. 72, therefore, the vestry or district board are not to be held liable for not keeping their sewers cleansed at all events and under all circumstances; but only where by the exercise of reasonable care and diligence they can and ought to know that they require cleansing, and where by the exercise of reasonable care and skill they can be kept cleansed. I therefore think the rule *should be made absolute to enter a verdict for the [323 defendants, and to arrest the judgment.

With reference to one authority to which we were referred, and which seems to be at variance with our present decision, viz. the case before Lord Penzance, *Meek v. Whitechapel Board of Works* (1), I have some doubt whether it is not quite consistent with our view, and whether the learned judge was not of opinion in that case that there was evidence of negligence, and did not mean to leave the question of negligence to the jury. If that were so, that ruling would not be inconsistent with our decision in this case: and, if otherwise, notwithstanding the great respect I entertain for one of the cleverest and most able judges I ever saw, I feel bound to say that I differ from him.

DENMAN, J.: I am of the same opinion, and clearly so in as far as our decision is consistent with the ruling of Lord Penzance in *Meek v. Whitechapel Board of Works* (1). Possibly if we had before us the whole circumstances of that case, the learned judge did not intend to give the go-by to the question of negligence. This case, however, turns upon the construction of s. 72 of the Metropolis Local Manage-

(1) 2 F. & F., 144.

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ment Act (18 & 19 Vict. c. 120), which it was contended by the plaintiff entitled him to a verdict because it imposed upon the vestry an absolute duty to cause the sewers vested in them to be "properly cleared, cleansed, and emptied" so as not to be a nuisance or injurious to health. At first sight, the language of that section would seem to be positive; and it might very plausibly be contended that an action would lie against the vestry for a breach of the absolute duty thereby imposed upon them. But I do not think that is the true way of reading the clause. The act of Parliament vests the sewers in the vestry or district board, and empowers them to do a variety of things in connection therewith, some of which contemplate a very considerable outlay. Sect. 72 is only one among many clauses which give them powers to do the things mentioned: but it clearly was not intended to render them liable to an action if in the exercise of those powers they are guilty of no negligence. Two or three things are suggested by the evidence and the findings of 324] *the jury,—such, for instance, as the operation of rats in the drain,—which show that that is the correct construction of the act. An obstruction may exist in a drain or a sewer for a considerable time without the vestry or board being able to ascertain the fact until their attention is called to it by the occupier of the premises affected by it. Here, the jury have found that the defendants could not by the exercise of reasonable care have known of the obstruction. That is an ample finding that they were guilty of no negligence, although the jury go on to say that they might have known of the existence of the drain by reasonable care and inquiry. I am of opinion that s. 72 is not so unjust as to impose a liability on the vestry under such circumstances; and I therefore agree with my Brother Brett that the judgment should be arrested and a verdict entered for the defendants.

Rule absolute.

Attorney for plaintiff :

Attorneys for defendants: *Cunliffe & Beaumont.*

[Law Reports, 9 Common Pleas, 325.]

May 7, 1874.

***D'ARC V. THE LONDON AND NORTH WESTERN RAIL- [325
WAY COMPANY.***Railway Company—Common Carrier—Special Contract—“At Owner's Risk”—
Negligence.*

Goods contained in several packages were delivered to a railway company at Chester to be carried to Halifax, under a contract note which expressed that they were to be carried “at owner's risk.” Several of the packages were delayed, through the negligence of the company, for, as the jury found, an unreasonable time, and their contents were in consequence damaged :

Held,—upon the authority of *Robinson v. Great Western Ry. Co.* (35 L. J. (C.P.), 123),—that the special terms of the contract did not absolve the company from responsibility for these consequences, notwithstanding that the goods were to be carried at a lower rate than the ordinary rate.

DECLARATION. First count, for not carrying and delivering goods entrusted to the defendants by the plaintiff to carry from Chester to Halifax within a reasonable time.

Second count, for damage to the goods by the defendants' negligence.

*Plea 4. That the goods were delivered by the plain- [326
tiff to the defendants subject to a special contract, whereby the plaintiff agreed to bear the risk of all loss or damage or delay in or relating to the carriage, or conveyance, or delivery of the goods by the defendants, in consideration of the defendants' charging him at a reduced rate for the carriage thereof; and that the alleged delay, loss, and damage were part of the delay, loss, and damage the risk whereof was agreed to be borne by the plaintiff.

Issue thereon.

The cause was tried before the assessor of the Court of Passage at Liverpool on the 14th of March last. The facts were as follows: The plaintiff was the proprietor of a collection of wax-work figures with which he was in the habit of travelling about the country for the purpose of exhibiting them. On the 31st of October, 1873, the plaintiff delivered these goods, which were packed in 111 cases described as containing “theatrical scenery and theatricals,” to the defendants at their station at Chester, to be carried to Halifax upon the terms of a special contract (signed by the plaintiff) which stated that they were to be carried “at owner's risk,” a lower charge being paid for the carriage of them on that account. The bulk of the goods arrived safely at Halifax on the 2d of November, which was as early as the business

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of the company would admit; one wagon, however, containing twenty packages, had by some means become detached from the rest of the train, and was ultimately found at Mirfield Junction, near Malvern, and did not reach its destination until the 7th of November, when it was found that some of the contents had been damaged by exposure to rain.

It was contended on the part of the defendants that they were not responsible for delay, there being no undertaking on their part that the goods should arrive by a particular time, nor any notice to them that their non-arrival by a given day would occasion special damage to the plaintiff; and that by the special terms of the contract they were absolved from the consequences of damage to the goods however caused.

The learned assessor told the jury that the plaintiff was entitled to such damages as he had sustained from the delay, if he had been unable in consequence to use the goods in the 327] way in which *he would have used them if they had arrived at Halifax within a reasonable time; and he left two questions to them,—1. Was there negligence on the part of the company? 2. Was the damage done to the goods the consequence of that negligence?

The jury found both questions in the affirmative, and returned a verdict for the plaintiff, damages £40. The learned assessor gave leave to the defendants to move to enter a non-suit or a verdict for the defendants, if this court should be of opinion that by the terms of the special contract under which the goods were carried the defendants were not liable for the consequences of their negligence.

Segar obtained a rule *nisi* in the terms of the reservation, or for a new trial on the ground of misdirection on the part of the learned judge in telling the jury, in assessing the damages, to take into their consideration the damage done to the goods.

R. G. Williams, Q.C., and Gully, showed cause: The latter branch of the rule cannot be sustained, no leave for a new trial having been reserved by the assessor.

[BRETT, J.: Is it not competent to this court to mould the rule, if the justice of the case requires it?]

Clearly not. Besides, here the point was not taken at the trial. The main question is, whether the company are relieved from responsibility for the delay and injury to the goods resulting from their negligence, by reason of the special terms of the contract. *Robinson v. Great Western*

Ry. Co. (1) is a distinct authority to show that the stipulation that the goods are to be carried "at owner's risk" does not cover damage by reason of delay. Nor does it absolve the carriers from the consequences of damage to the goods resulting from negligence. In the case of a passenger, it was held in *M'Cauley v. Furness Ry. Co.* (2) that similar words "must be taken to exclude all liability on the part of the company for any negligence for which they would otherwise have been liable." But, in the case of passengers the company are not insurers. In *Gill v. Manchester Ry. Co.* (3), a cow was carried under a contract by which it was agreed that the company were not to be responsible *for any loss [328 or injury to cattle in the receiving, forwarding, or delivering, if such damage should be occasioned by kicking, plunging, or restiveness. The cow having been killed by what the majority of the court conceived to be negligence on the part of a servant of the company, they were held to be liable notwithstanding the special terms of the contract. Lush, J., there says (4): "It cannot, I think, be contended that this condition dispenses with the use of reasonable care on the part of the company in the receiving, carrying, and delivering cattle, any more than the exception of perils of the sea in a bill of lading relieves a shipowner from the obligation to navigate with ordinary skill and care. The exception goes to limit the liability, not the duty. It is the duty of the carrier to do what he can, by reasonable care and skill, to avoid all perils, including the excepted perils. If, notwithstanding such skill and care, damage does occur from these perils, he is released from liability; but, if his negligence has brought on the peril, the damage is attributable to his breach of duty, and the exception does not aid him: see *Phillips v. Clark*" (5). There are many earlier cases, which are all summed up in the judgment of Parke, B., in *Wyld v. Pickford* (6).

[LORD COLERIDGE, C.J., referred to *Martin v. Great Indian Peninsular Ry. Co.* (7). There, the defendants, carriers in India, received the plaintiff's goods under a contract by which the baggage of certain troops (including the plaintiff's goods) was to remain in charge of a guard provided by the troops, "the company accepting no responsibility;" and it was held that this stipulation did not exempt the defendants from liability for a loss arising wholly from their own negligence.]

(1) 35 L. J. (C.P.), 123.

(2) Law Rep., 8 Q. B., 57.

(3) Law Rep., 8 Q. B., 186.

(4) Law Rep., 8 Q. B., at p. 196.

(5) 2 C. B. (N.S.), 156; 26 L. J. (C.P.), 168.

(6) 8 M. & W., 443.

(7) Law Rep., 3 Ex., 9.

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That case is directly in point. *Wilton v. Atlantic Royal Mail Steam Navigation Co.* (1), *Carr v. Lancashire and Yorkshire Ry. Co.* (2), and *Grill v. General Iron Screw Collier Co.* (3), were also cited.

Graham, in support of the rule: There is nothing unreasonable in a condition that the goods shall be carried at 329] owner's risk, *where, as here, alternative rates are given. All the cases are collected in *Peek v. North Staffordshire Ry. Co.* (4); and the fair result of them is summed up in the opinion of Blackburn, J. (5), thus: "I think that a condition exempting the carriers wholly from liability for the neglect and default of their servants is *prima facie* unreasonable. I do not go so far as to say that it is necessarily in every case unreasonable and void. A carrier is bound to carry for a reasonable remuneration; and, if he offers to do so, but at the same time offers in the alternative to carry on the terms that he shall have no liability at all, and holds forth as an inducement a reduction of the price below that which would be reasonable remuneration for carrying at carrier's risk, or some additional advantage which he is not bound to give and does not give to those that employ him with a common law liability, I think a condition thus offered may be reasonable enough; for, the terms of a special contract entered into by a person who has the option of employing the carrier on the terms of the contract, or on the terms of his undertaking the common law liability, are necessarily reasonable as regards the person having that option." In *Allday v. Great Western Ry. Co.* (6), the condition that "the company are not to be amenable for any consequences arising from detention or delay in or in relation to the conveying or delivering of the said animals, however caused," was held to be unreasonable because no option was given. In *Robinson v. Great Western Ry. Co.* (7) the condition was held to be a reasonable one, but not to exonerate the company from the consequences of a negligent delay. That decision was intelligible enough, inasmuch as the contract had reference to the carriage of live animals, which would necessarily require feeding if delayed beyond a reasonable time. *Simons v. Great Western Ry. Co.* (8) and *London and North Western Ry. Co. v. Dunham* (9) are also distinct authorities in favor of this restriction of the company's liability.

(1) 10 C. B. (N.S.), 453; 30 L. J. (C.P.), 369.

(2) 7 Ex., 707; 21 L. J. (Ex.), 261.

(3) Law Rep., 1 C. P., 600; in error, Law Rep., 3 C. P., 476.

(4) 10 H. L. C., 473; 32 L. J. (Q.B.), 241.

(5) 10 H. L. C., at p. 511.

(6) 5 B. & S., 903; 34 L. J. (Q.B.), 5.

(7) 35 L. J. (C.P.), 123.

(8) 18 C. B., 805; 26 L. J. (C.P.), 25.

(9) 18 C. B., 826; 26 L. J. (C.P.), 25.

[BRETT, J.: Do you say that the result of the cases is that a condition which might be unreasonable if there was but one *rate of charge, becomes reasonable if there are [330 alternative rates?]

It is enough for the present purpose that a court of co-ordinate jurisdiction has said so. Mere delay is not negligence.

[BRETT, J.: The jury have found that there was negligent delay. If that is not covered by this contract note, you cannot enter a nonsuit.]

LORD COLERIDGE, C.J.: I am of opinion that this rule should be discharged; and I base my opinion upon the case of *Robinson v. Great Western Ry. Co.* (') within which this case distinctly falls. The goods in question, consisting of wax-work figures, were sent by the defendants' railway from Chester to be carried to Halifax, under a special contract which described them as being carried "at owner's risk." The greater part of the goods arrived safely; the remainder, consisting of twenty cases, did not reach their destination until several days afterwards, having been delayed on the journey and damaged in consequence of the negligence of the servants of the company, of which there was abundant evidence for the jury. This court in *Robinson v. Great Western Ry. Co.* (') determined, upon a contract in terms very similar to those of the contract in the present case, that the words "at owner's risk" only exempted the company from the ordinary risks incurred by goods in going along the railway, and does not cover injury from delay caused by the negligence of the company. That case is directly in point, the only difference being that there the thing carried was live stock, and here goods. The other cases referred to do not come in question.

BRETT, J.: This case is clearly not distinguishable from *Robinson v. Great Western Ry. Co.* ('). If there had been any distinction between that case and this, Mr. Graham would have suggested it. The circumstance of the one case relating to live and the other to inanimate chattels was hardly put as a real distinction.

DENMAN, J.: If this had been the case of a loss or damage to goods in the course of the transit, possibly *Simons v. Great Western Ry. Co.* (') might have been held to apply. But it is unnecessary *to consider that. *Robinson v.* [331

(') 35 L. J. (C.P.), 123.

(') 18 C.B., 805; 26 L. J. (C.P.), 25.

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Great Western Ry. Co. (1) is so distinctly in point that we cannot do otherwise than discharge this rule.

Rule discharged.

Attorney for plaintiff: *H. Sowton.*

Attorney for defendants: *R. F. Roberts, for R. M. Preston, Chester and Liverpool.*

(1) 35 L. J. (C.P.), 123.

[Law Reports, 9 Common Pleas, 331.]

May 5, 1874.

GUNN V. ROBERTS and Others.

Ship and Shipping—Ship's Necessaries—Authority of Captain to pledge Owner's Credit—Effect of Owner's having an Agent at the Port.

Where the owner of a ship had an agent at the port where she was lying, authorized and ready to supply the ship's requirements:

Held, that the master had no implied authority to pledge the owner's credit at such port for necessities supplied for the ship's use.

DECLARATION, common counts for money lent and work done, and materials provided, and money found to be due on accounts stated.

Plea (*inter alia*), never indebted, and as to part of the claim, payment into court.

Issues.

The facts at the trial appeared to be as follows: The defendants were the owners of a ship called the *Aracana*. The action was brought to recover in respect of goods and materials supplied and money advanced by the plaintiff upon the order of the captain of the *Aracana* for the necessary purposes of the ship while she was at Quebec, to which port she had come in search of a cargo. The ship was consigned to Messrs. Ross & Co., at Quebec, and the defendants supplied them with funds and authorized and instructed them, as their agents, to advance any further sums for the purpose of supplying the necessities of the ship for her voyage. The defendants had forbidden the captain from applying or pledging their credit to any other persons than Ross & Co in respect of the ship's necessities. The plaintiff was 332] ignorant of this, and of the *fact that Ross & Co. were the defendants' agents; but the jury found that he might, by making ordinary inquiry, have ascertained the fact that Ross & Co. were the defendants' agents for the purposes of the ship. Ross & Co. were ready, and willing, and able to advance any sums that might have been necessary for the purposes of the ship. Upon these facts the verdict was en-

tered for the plaintiff for £113, leave being reserved to the defendants to move to enter it for themselves, on the ground that, on the facts proved and found by the jury and admitted, the defendants were not liable in point of law for any part of the plaintiff's claim, or beyond the sum paid into court.

A rule *nisi* had been obtained accordingly.

Benjamin, Q.C., and *Wormald*, showed cause: The master is the general agent of the owner for the purposes of the ship, and his authority cannot be limited by restrictions unknown to the person dealing with him: *Smith's Mercantile Law*, 7th ed., p. 128; *Grant v. Norway*(¹). The advances made in the present case are admitted to be necessities.

[BRETT, J.: It is clear if the things supplied are necessities there is a general authority to order them, but the question is in what sense is the term "necessaries" used. Suppose the owner himself were in the port, would the captain have authority? In such case goods supplied to the captain's order would not be necessities in one sense, because the owner would have supplied them. Is not an agent at the port the same as the owner?]

If the owner were at a foreign port unknown to the person making the advance, the captain would have authority to pledge the owner's credit.

[BRETT, J.: The opinion of Lord Abinger in *Arthur v. Barton*(²) is against you. He says, "But this authority does not usually extend to cases where the owner can himself personally interfere, as in the home port or in a port in which he has beforehand appointed an agent who can personally interfere to do the thing required."]

That was merely a *dictum*, not being necessary for the decision of the particular case, and it applies to the case of a general *agent, known to be such to all the world, as [333 for instance, the agents of the Cunard steamships at their regular ports, not to the case of an agent for a particular occasion only. This was not like the case of a ship at her regular port; the ship here was at a strange port on a seeking voyage.

[BRETT, J.: Suppose the captain has funds in hand supplied by the owner, can he pledge the owner's credit? Yet the person making the advance may not know that he has such funds.]

Here no funds were in fact advanced, though it was found that Ross & Co. were ready to advance. It is a question of fact for the jury whether the goods supplied were necessa-

(¹) 10 C. B., 665; 20 L. J. (C.P.), 93.

(²) 6 M. & W., 138.

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ries or not. The question cannot depend on the existence of an agent only, for the person making the advance might inquire and be unable to find out whether there was an agent or not. In such case it would appear from the opinion expressed by Dr. Lushington in *The Faithful* (¹), that there would be an implied authority in the captain to pledge the owner's credit. This case is wholly distinguishable from such a case as that of *Johns v. Symons* (²), where the ship was in a home port, and the owner could easily be communicated with. The statement of the law by Lord Abinger in *Arthur v. Barton* (³), cannot now be considered as correct, and the only question is whether the things are necessary for the ship: *The Alexander* (⁴).

[BRETT, J.: According to your contention the shipowner is left quite defenceless.]

It must be shown that the advance has been expended for necessities not supplied from some other source. The owner must, therefore, always have the benefit of the advance. It is only a question whether credit is to be given by A. or B. Can secret instructions to the captain to procure necessities from B. only discharge the owner, if the captain disobeys and procures advances from A., from all liability to A., and enable him to take advantage of sums in fact advanced by the latter for necessities without repaying them?

They cited *Brayshaw v. Eaton* (⁵); *Edwards v. Havell* (⁶); 334] **Macintosh v. Mitcheson* (⁷); *Williamson v. Page* (⁸); *Webster v. Seekamp* (⁹); *The Riga* (¹⁰); *Macready v. Thorn* (¹¹).

C. Russell, Q.C., and Cohen, Q.C., supported the rule: The onus of proving that the advances were of necessities lies on the plaintiff. That is not satisfied merely by showing that the articles were necessary for the ship, i. e., things that somebody must supply, but regard must be had to the question whether the captain was otherwise supplied with the means of obtaining them. When the owner has provided the captain with funds or other means of providing such necessities there is no implied authority to pledge his credit. The question is whether, in defining "necessaries," the nature of the thing supplied alone is to be looked at. If so, then it would be immaterial whether the owner were at the port or could be communicated with, which would clearly

(¹) 81 L. J. (P. M. & A), 81

(²) 2 Q. B., 425.

(³) 6 M. & W., 138.

(⁴) 1 Wm. Rob., 346.

(⁵) 5 Bing. (N.C.), 231.

(⁶) 14 C. B., 107; 23 L. J. (C.P.), 8.

(⁷) 4 Ex., 175; 18 L. J. (Ex.), 385.

(⁸) 1 C. & K., 581.

(⁹) 4 B. & A., 352.

(¹⁰) Law Rep., 3 A. & E., 516.

(¹¹) 51 New York App. Ca., 454.

conflict with the whole current of authority. The question is not as to the necessity of the thing supplied for the ship, but the necessity for entering into the particular contract for the supply of it.

[They were then stopped by the court.]

BRETT, J.: The facts of the case are as follows: The plaintiff supplied to the defendants' captain in a foreign port goods which may be taken to have been necessaries in the sense that the ship would not have been fit to sail unless somebody had supplied them. But it was proved or admitted that the owners had instructed Ross & Co. to act as their agents for the ship in the port, and had supplied them with funds for that purpose, and authorized them to advance any further sums that might be necessary on their credit. It was also admitted that Ross & Co. being so instructed to act as agents for the management of the ship in the port, as such agents, were ready, and willing, and able to advance any sums which might be required for the ship. The captain who, in fact, knew of this, though I do not say his knowledge was material, fraudulently gave orders to the plaintiff for supplies to be advanced on the credit of the owners. The plaintiff was altogether innocent of the fraud, and was also ignorant *of the authority given [335 to Ross & Co. and of the fact of their being agents for the ship. The jury found that the plaintiff might by reasonable inquiry have known that Ross & Co. were such agents, and were authorized to advance money for the purposes of the ship. Under these circumstances the plaintiff having afforded supplies for the ship, brought this action against the defendants for money advanced and goods supplied for the use of the ship, on an alleged contract to repay such money and to pay for such supplies. One point that was taken was, that though the captain was not entitled to borrow money and pledge the owners' credit, yet he having done so, the defendants had ratified his acts. There is no doubt they could so ratify them, but to prove such ratification it was necessary to show that they acted with knowledge of the circumstances. There was no evidence of this, and therefore it seems to us there was no ratification. The case therefore is the ordinary case of money lent, and goods supplied, on the order of the captain. Now, there was no actual contract between the plaintiff and defendants, the contract being in point of fact made between the captain and the plaintiff, and the defendants are not bound unless the captain had authority. It was said that the captain is the general agent of the owners. That proposition cannot

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be supported in the fullest sense of the terms in which it was stated. The captain has authority to bind the owners to pay for supplies or repay money advanced, only when the necessity of the case gives him that authority. In order to give rise to that authority it has for many years been recognized that two things are necessary; first, it must appear that the money borrowed or goods supplied were necessary for the use of the ship, not absolutely necessary, but reasonably necessary according to the ordinary course of prudent conduct in the opinion of the jury; secondly, it is not sufficient that the moneys lent, or goods supplied, were necessary for the ship's use, but it must be shown also that it was reasonably necessary that the captain should obtain or order them on the owner's credit. If the captain be in a foreign port, and the owner is not there, and there is no agent of his there, and the captain has not himself been put in funds by the owner, then it may be reasonably necessary that he should order supplies on the owner's credit for 336] the necessary purposes of the ship, as in *the case of *Edwards v. Havell* ⁽¹⁾; but if he is either in a port in the owner's country or a foreign port, and the owner is there with means to pay for goods or credit to order them for himself, the owner is the master of affairs, and there is no necessity for the captain to order them or to pledge the owner's credit, and so there is no necessity for the captain's making a contract to bind the owner. Accordingly, if it be found that the owner is present at the port, and has the means or credit to obtain supplies, I think it is the law of England that the judge should direct the jury that there is no necessity for any authority on the part of the captain, and the jury would not be justified in finding that there was any such necessity. The same principle applies even when the owner is not present, if he has either in a port in his own or a foreign country constituted an agent to stand in his place, and entrusted such agent with his discretion to act in the management of the ship, and such agent has undertaken and has the necessary means or credit to do so. In such case the agent represents the owner, and the captain as servant of the owner is bound to act under his directions, and has no authority to act for himself in the matter. This view of the law appears to be supported by all the authorities. The leading case on the subject is *Arthur v. Barton* ⁽²⁾, and the opinion there expressed by Lord Abinger as a summary of all the previous authorities has always been held as a correct expression of the law. That opinion has

⁽¹⁾ 14 C. B., 107; 23 L. J. (C.P.), 8.

⁽²⁾ 6 M. & W., 138.

always been quoted with approbation ever since; it has never to my knowledge been questioned and has been copied into all the text books, as for example, *Abbott on Shipping*, 11th ed. p. 114; *Smith's Mercantile Law*, 7th ed. p. 128, and *McLachlan on Merchant Shipping*, p. 131.

Mr. Benjamin contended that the general law is that the master has an implied authority to bind the owner in respect of all things that are necessary for the navigation of the ship; but the question upon which the extent of this proposition depends is the meaning of the term "necessary." That was discussed in *Arthur v. Barton* (¹), and the limitation of the meaning of the term there laid down is that the necessity of the thing depends not only on the question whether it is necessary for the use of the ship, but *on [337 the question whether the owner is himself present at the port or has an authorized agent there. Mr. *McLachlan*, in his work on Merchant Shipping, p. 131, correctly states the law as follows: "As appears from those early cases, but especially the last, there are well-defined limits to the exercise of this authority on the part of the master. First, in cases where the owner or his agent is at the port of the ship's anchorage, or so near to it as to be reasonably expected to interfere personally, the master cannot, without special authority for the purpose, pledge the owner's credit for the ship's necessities." And further: "This authority of the master, when it exists, extends only to such things as a prudent man would deem reasonably necessary and proper to be done or supplied for the purpose of the voyage on which the vessel is engaged."

Two elements therefore are essential to the captain's authority: first, that the goods supplied should be such as it must be taken the owner, if present, would, as a prudent man, have thought necessary; and, secondly, that neither the owner nor a recognized agent of the owner, able to pay for the supplies or to obtain them on credit, should have been present at the port. If the plaintiff fails in proving the existence of either of these elements, he fails in proving the necessary authority to bind the defendants. This doctrine is in accordance with the law with regard to hypothecation. No captain is entitled to hypothecate the ship unless the necessity of the case gives him authority. And it is essential to such authority that neither the owner nor any authorized agent of his should be at hand; and it is necessary in this case, on account of the onerous nature of the obligation, that the money should have been procurable

(¹) 6 M. & W., 138.

by no other means than the hypothecation of the ship. Unless these conditions exist, however necessary the advance may have been for the purposes of the ship, there is no authority on the part of the captain. In these cases attempts have been made to contend that if the person advancing money did not know that the owner or his agent was at hand, he was entitled to charge the owner, on the order of the captain as a general agent; but it has invariably been held that the absence of knowledge on the part of the person making the advance was immaterial.

The same law applies to the captain's right to sell part of 338] the *cargo. It has been said that the decision in *The Faithful* (') has broken in upon the previous line of authority on this subject. I have the utmost respect for the opinion of Dr. Lushington, than whom a more accurate lawyer never sat on the bench; but I feel bound to say that some of the views thrown out by him in that case seem to me to be novel, and I doubt whether they can be sustained. But even if they could, they would not assist the plaintiff in this case, for the finding of the jury takes the case out of the limitation suggested in *The Faithful* ('). I do not think that the American case that was cited in any way derogates from the view expressed in *Arthur v. Barton* (') and the previous English authorities.

For these reasons I think that, on proof that Ross & Co. were the agents of the owners for the management of the ship at the port, and had undertaken and were ready and able to act as such, the judge ought to have directed the jury that there was no case for the plaintiff, and that this rule should, therefore, be made absolute.

DENMAN, J.: I am of the same opinion. The case of *Arthur v. Barton* ('), which has been relied on for the defendants, does not, it is true, contain an actual ruling on the point now in question, but only a *dictum*. That *dictum*, however, is entitled to the greatest weight. It was delivered in a case in the argument of which the whole of the law on this subject had been brought before the court, and it has been adopted and approved of in subsequent cases and the text books. In *Maude and Pollock's Merchant Shipping*, 3d ed. p. 112, the law is thus stated: "This implied authority does not usually exist in cases where the owner can himself personally interfere, as, for instance, when the ship is in a port where the owner resides, or at which he has beforehand appointed an agent."

In all the statements of the law of the subject it seems

(') 31 L. J. (P.M. & A.), 81.

(') 6 M. & W., 138.

always to be assumed that it is well settled that the captain has no authority to pledge the owner's credit when he has an authorized agent in the port. Though there is no case actually deciding the point, all the cases seem to corroborate this view. In all the *decisions with respect to a ship [339 in her home port, the question whether the master was justified in pledging the owner's credit seems to have been made to turn on the question whether there was any person at hand who might more properly be considered as having authority to pledge such credit; and it seems to have been generally recognized that if there were an agent of the owner present at the port he would be the proper person to bind the owner. With regard to the question of ratification I agree with my Brother Brett. In the view we have taken, the finding that the plaintiff might have ascertained that Ross & Co. were defendants' agents becomes immaterial, but it may be remarked that even if the view alleged to have been taken in the case of *The Faithful* (') be correct, the finding of the jury prevents its having any application to the present case, and so *quacumque via* the plaintiff must fail.

Rule absolute.

Attorneys for plaintiff: *Stevens, Wilkinson & Harris.*

Attorneys for defendants: *Field & Roscoe, for Bateson.*

(') 31 L. J. (P.M. & A.), 81.

[Law Reports, 9 Common Pleas, 339.]

May 4, 1874.

Bows, Appellant; FENWICK, Respondent.

*Unlawfully using a "Place" for the Purpose of Betting, within 16 & 17 Vict.
c. 119, s. 8.*

The appellant was on a race-course standing on a stool, over which was a large umbrella, similar to a carriage umbrella, capable of covering several persons, the stock being made in joints like that of a sweep's brush, so as to be taken in pieces, and was fastened in the ground with a spike. The umbrella when open was seven or eight feet high. It was a showery day; but the umbrella was kept up rain or dry. On the umbrella was painted in large letters "G. Bows, Victoria Club, Leeds." There was also a card exhibited, on which were the words, "We pay all bets first past the post." The defendant was calling out, offering to make bets; and he was seen to make several bets, the money being deposited with him, and for which he gave a ticket:

Held, that the appellant was using a fixed and ascertained "place" for the purpose of betting with persons resorting thereto, and was properly convicted thereof under 16 & 17 Vict. c. 119, s. 8.

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CASE stated by justices pursuant to 20 & 21 Vict. c. 43.

At a petty session of the peace holden in and for the city 340] of *Chester on the 14th of June, 1873, George Bows was charged with having on the 9th of May, 1873, in the said city and borough, being then the occupier of a certain place, to wit, a standing on the Roodee there situate, unlawfully used the said standing for the purpose of betting with persons resorting thereto, upon certain events and contingencies of and relating to a certain horse-race, contrary to s. 1 of the statute 16 & 17 Vict. c. 119.

It appeared from the evidence that, on the day in question, during the Chester races, the defendant was on the Roodee or race-course, standing on a stool about 2 ft. 6 in. high, over which was a large umbrella, similar to a carriage umbrella, capable of covering several persons, the stock being made in joints like that of a sweep's brush, so as to be taken in pieces, and was fastened in the ground with a spike. The umbrella when opened was 7 ft. or 8 ft. high. It was a showery day; but the umbrella was kept up rain or dry. On the umbrella was painted in large letters, "G. Bows, Victoria Club, Leeds." There was also a card exhibited, on which were the words, "We pay all bets first past the post." The defendant was calling out, offering to make bets; and he was seen to make several bets, the money being deposited with him at the time, and for which he gave a ticket.

It was contended on behalf of the defendant that the stool and umbrella did not constitute a "place" within the meaning of the act of Parliament, 16 & 17 Vict. c. 119, s. 1; but, the justices being of opinion that they did, they convicted the defendant in a penalty of £5.

The question for the opinion of the court was, whether the stool and umbrella used as aforesaid by the defendant did constitute a "place" within the terms of the act of Parliament and section above referred to.

Straight, for the appellant: The conviction was wrong. The 16 & 17 Vict. c. 119, intituled "An act for the suppression of betting-houses," recites that "a kind of gaming has of late sprung up, tending to the injury and demoralization of improvident persons, by the opening of places called betting-houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, 341] or by other persons acting on their behalf, *on their promises to pay money on events of horse-races and the like contingencies," and enacts (by s. 1) that "no house, office, room, or other place shall be opened, kept, or used," for

the purposes mentioned in the preamble; and s. 3 enacts that "any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them, &c., and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid, or any of them," shall, on summary conviction before two justices, be liable to a penalty not exceeding £100. The question is whether the stool and umbrella described in the case constituted an "office, room, or other place," within s. 3 of the statute. In *Doggett v. Catterns* (¹), the Exchequer Chamber, reversing the judgment of this court (²), held that the habitual use of a spot in a public park for the receiving of deposits, to return a larger sum on the contingency of a particular horse winning a race, was not the using of a "place" for such purpose, within the meaning of the act; Bramwell, B., saying: "The object of the statute was to put down ascertained places of resort for gambling. I think the place in question was not a place of that sort within the contemplation of the act."

[LORD COLERIDGE, C.J.: *Shaw v. Morley* (³) is more like this case. On land adjoining a race-course, and just outside an enclosure reserved for ticket-holders, was a long strip of ground of 6 ft. wide, bounded on one side by an iron railing which surrounded the enclosure, on the other side by a permanent wooden paling facing the open ground. Within this strip were placed temporary wooden structures, in which during the races the business of betting was carried on. There were desks fronting both ways, and at each desk was a clerk with a book, and a person standing in front of each desk conducted the business on behalf of the person who rented the strip of land, and the bets were recorded by the clerk. At one of these structures the appellant conducted this *business. On an appeal from a conviction under [342 16 & 17 Vict. c. 119, s. 3, the Court of Exchequer held that this structure was an "office" and a "place" within the meaning of the statute, and that the appellant was rightly convicted. Kelly, C.B., in giving judgment, says: "This structure was clearly a place and an office opened, kept, and used for the purpose of carrying on the business of which the appellant had the care and management, or which

(¹) 19 C. B. (N.S.), 765; 34 L. J. (C.P.), 159. (²) 17 C. B. (N.S.), 669; 34 L. J. (C.P.), 46.

(³) Law Rep., 3 Ex., 137.

he assisted in conducting. If on the grounds urged by the appellant we were to determine to the contrary, at once betting offices copied from the words in which this structure is described would throughout England set the act at defiance. It is no matter whether there is a roof or none, or whether the structure is removable or fastened to the earth; it is clearly an office within the meaning of the act. Then, was the business conducted by the appellant the business prohibited by the act? The preamble shows that it is within the intent of the act; for, the mischief recited is exactly gaming of the description which was here conducted by the appellant, carried on by means of an office. And, further, the business described in the first section, and the conducting of which in an office kept for that purpose is made penal by s. 3, is exactly the business described in the case as conducted by the appellant; from the beginning to the end, what has been done is the very thing to prevent which the act was passed." And Martin, B., adds: "The structure described was both an office and a place. It is equally clear that the appellant has done in this place what the act declares to be illegal." I am unable to distinguish the stool and umbrella in this case from the stool and desk there.]

The words "other place," in the statute, mean a place *ejusdem generis* with those specifically described. In *Shaw v. Morley* (¹), there was a desk, the usual furniture of an "office," and the party no doubt paid rent for the use of the spot.

[LORD COLERIDGE, C.J.: "Other place" must mean something different from an "office" or "room." It cannot be denied that this case is directly within the mischief pointed at by the act.]

In *Doggett v. Catterns*, Bramwell, B., says (²): "The object of the statute was to put down ascertained places of 343] resort for *gambling. I think the place in question was not a place of that sort within the contemplation of the act."

[BRETT, J.: Would a space of ground enclosed with stakes and ropes, like a prize-ring, be a "place" within the act? Or a wagon with an awning?]

Nothing can be said to be a fixed or ascertained place from which the occupant might be ordered to move on.

No counsel appeared for the respondent.

LORD COLERIDGE, C.J.: I am of opinion that this conviction should be affirmed. It proceeds in terms upon s. 1 of 16 & 17 Vict. c. 119, which enacts "that no house, room, or

(¹) Law Rep., 3 Ex., 137.

(²) 19 C. B. (N.S.), at p. 767.

other place shall be opened, kept, or used" for the purposes mentioned in the preamble, viz. the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse-races and the like contingencies. Then comes s. 2, which enacts in the same words that "every house, room, office, or place opened, kept, or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming house within the meaning of 8 & 9 Vict. c. 109." And then comes s. 3, upon which in truth this conviction must be sustained, which enacts that "any person who, being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them, &c., and any person having the care or management of or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid or any of them," shall, on summary conviction before two justices, be liable to a penalty not exceeding £100.

The facts found by the magistrates are these: During the Chester races the appellant was on the race-course, standing on a stool about two feet six inches high, over which was a large umbrella, similar to a carriage umbrella, capable of covering several persons, the stock being made in joints like that of a sweep's brush, so as to be taken in pieces, and was fastened in the ground with a spike. The umbrella when opened was seven or eight feet *high. It was a [344 showery day; but the umbrella was kept up, rain or dry. On the umbrella was painted in large letters "G. Bows, Victoria Club, Leeds." There was also a card exhibited, on which were the words "We pay all bets first past the post." The appellant was calling out, offering to make bets; and he was seen to make several bets, the money being deposited with him at the time, and for which he gave a ticket. It is plain that the appellant was (provided the stool and umbrella constituted an office, room, or place within the meaning of the act), publicly using them for a purpose prohibited by the act. The only question raised before us was, whether or not they did constitute an office, room, or other place. Now the thing described clearly was not a house or a room. Was it an office or other place? Possibly it might be said to be in some sense an office: but I am of opinion that at all events it was a "place." It was an ascertained spot where the appellant for the time at least carried on the business of

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betting with all persons who might resort thither for that purpose. The card connected with the umbrella and the inscription upon it clearly indicated a fixed and ascertained place used by the appellant for a purpose prohibited by the act.

This statute is, no doubt, an interference with the liberties of the subject, and is therefore to be construed strictly. Two cases upon it have been referred to, the one, *Doggett v. Catterns* (¹), a decision of this court, reversed by the Exchequer Chamber (²), the other a decision of the Court of Exchequer, *Shaw v. Morley* (³). In *Doggett v. Catterns* (¹) this court held that the habitual use of a spot in a public park where the party walked about receiving deposits, to return a larger sum on the contingency of a particular horse winning a race, was the using of a "place" for such purpose within the meaning of the act. The Exchequer Chamber reversed that decision, though upon conflicting,—I will not say inconsistent,—grounds; the Lord Chief Baron thinking that the circumstance of the place being open to the sky or the structure not being fixed to the earth did not prevent its being an office or a place within the meaning of the act; and 345] Bramwell, B., being of *opinion that the object of the legislature was to put down betting of the kind described in an ascertained place to which people might resort for the purpose of doing that which the act intended to prohibit. One half of the court agreed with the Lord Chief Baron, and the other half with Mr. Baron Bramwell. It is enough, however, to say that this case is not governed by that case. There was there no ascertained place within the ambit of the park in which the appellant carried on his avocation. Without, therefore, quarrelling with the decision of the Exchequer Chamber, which does not at all interfere with our present judgment, we find in *Shaw v. Morley* (³) a case exactly all fours with the present. I have already stated the facts of that case, and the observations of Lord Chief Baron Kelly and Martin, B., thereon. The circumstances are not exactly the same as here; but they are much more like them than those of *Doggett v. Catterns* (¹), and the reasoning of the judges carries me to the conclusion I have arrived at. There is a sufficient fixity of the structure by means of the spiked umbrella to bring the case within the words of the act, as it is clearly within the mischief, and our judgment is not op-

(¹) 19 C. B. (N.S.), 765; 34 L. J. (C.P.), 159. (²) 17 C. B. (N.S.), 669; 34 L. J. (C.P.), 46.

(³) Law Rep., 8 Ex., 187.

posed to any case that I have been able to find. The conviction must be affirmed.

BRETT, J.: When the act of Parliament in question passed, the legislature had not made up its mind to prohibit gaming altogether. But what it did mean to prohibit was that which is described in the preamble, viz., a kind of gaming which had of late sprung up, tending to the injury and demoralization of improvident persons, "by the opening of places called betting-houses or offices, and the receiving of money in advance by the owners or occupiers of such houses or offices, or by other persons acting on their behalf, on their promises to pay money on events of horse-races and the like contingencies." That discloses the kind of gaming which was sought to be suppressed. The enacting part of s. 1 then provides that "no house, *office*, room, or *other place* shall be opened, kept, or used" for the purposes mentioned in the preamble. And then s. 3 enacts that "any person who, being the *owner or occupier of any house, *office*, [346 room, or *other place*, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them, &c., and any person having the care or management of or in any manner assisting in conducting the business of any house, *office*, room, or *place* opened, kept, or used for the purposes aforesaid, or any of them," shall on summary conviction be liable to a penalty. It would seem, therefore, that the kind of gaming prohibited is the opening and keeping a place for the purpose of gaming or betting with persons resorting thereto,—a fixed place to which all persons may resort. I agree that it is necessary that it should be a "fixed place," whether on a race-course or elsewhere. The remarks both of Pollock, C.B., and of Bramwell, B., in *Doggett v. Catterns* (1) show that, to bring it within the statute, the place used need not be a house, office, or room, but that it must be a fixed and ascertained place. Now, was this a fixed place? It was a place selected and fixed upon by the appellant for persons who desired to deal with him to resort to. I therefore think it was a place within the contemplation of the act. The appellant goes there with a stool and a thing which probably is not an umbrella, but is more like an open tent. He takes it, not to shelter him from the rain, but to be a fixed place. The material part of the statement is, that, having fixed this umbrella or tent into the ground, with his name painted on it and a reference to a club at Leeds which probably has no existence, he exhibits a card with these words, "We pay

(1) 19 C. B. (N.S.), 765; 34 L. J. (C.P.), 159.

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all bets first past the post,"—meaning obviously, we pay here; or, in other words, if the holders of tickets will resort to or come under this umbrella they will be paid, if winners. The umbrella was intended as a fixed place for persons desirous of making bets to resort to, and was clearly a place within the contemplation of the act as interpreted by this court and by the Exchequer Chamber in *Doggett v. Catterns* (¹). Mr. Straight suggests that this was not a fixed place, because the appellant paid no rent, and was liable to be moved on by the police. I must confess I see no weight in that suggestion.

DENMAN, J.: I am of the same opinion. I agree with my 347] *lord that neither of the cases referred to is absolutely in point. And I think that *Shaw v. Morley* (²) approaches more nearly in its circumstances to this case than *Doggett v. Catterns* (¹) does. The question is whether the place used by the appellant for the exercise of his calling was an "office" or "other place" within the meaning of s. 3 of the statute. I think it was. It was enough that there was a piece of ground ascertained and appropriated by the appellant for carrying on his proceedings. He stood upon a stool, covered by a large umbrella, not for the purpose of sheltering him from the weather, but with the inscription upon it and the card to indicate the spot to which persons desirous of having betting transactions with him might resort, and the kind of business he was carrying on there; and the case finds that he was seen to make bets and to issue tickets. I am clearly of opinion that he was properly convicted.

Conviction affirmed.

Attorneys for appellant: *Doyle & Edwards, for J. P. Cartwright, Chester.*

(¹) 19 C. B. (N.S.), 765; 34 L. J. (C.P.), 159.

(²) Law Rep., 3 Ex., 187.

[Law Reports, 9 Common Pleas, 347.]

May 8, 1874.

In the matter of ISABELLA HOWARD.

In the matter of JULIA ASHCROFT.

Husband and Wife—Acknowledgment of Deed under 8 & 4 Wm. 4, c. 74—Affidavit of Verification—Absence of Signature of Deponent—Blanks.

The affidavit verifying the certificate of an acknowledgment taken by special commissioners in the East Indies left a blank for the place of abode of one of the commissioners; but, as the affidavit stated that he was "the other commissioner in the said certificate mentioned," the court allowed it to pass.

The affidavit was not signed by the deponent. The jurat, however, stated that it

was sworn before a magistrate and justice of the peace (who duly described his office or authority) by the deponent:

Held,—upon the authority of *Re Eady* (6 Dowl. 615) and Reg. Gen. Hilary Term, 1863,—that the defect was cured.

ON the 7th of April, 1873, a commission was issued from this court under the 3 & 4 Wm. 4, c. 74, directing William Chaine, major in the 4th Hussars, George Marriner, captain in the 58th regiment of Foot, George J. D. Hay, *major in Her Majesty's army*, *and the Rev. M. S. Laing, [348 chaplain in Her Majesty's army, all residing at or near to Rawull Pindee, in the East Indies, or any two of them, to take the acknowledgment of Isabella, wife of Frederick Howard, of Rawull Pindee aforesaid, sergeant in the 4th Hussars.

The certificate of the taking of the acknowledgment, dated the 12th of December, 1873, stated that Isabella Howard appeared before Malcolm S. Laing and G. J. Dalrymple Hay, two of the commissioners in the said commission named, and produced an indenture bearing date the 21st of January, 1873, and made between Robert Sheffield and Ann Margaret his wife of the first part, Frederick Howard and Isabella his wife of the second part, William Ashcroft and Julia his wife of the third part, William Street of the fourth part, and Thomas Thorpe De Lasaux and Robert Augustus De Lasaux of the fifth part, and duly acknowledged the same.

This document was signed "Malcolm S. Laing, chaplain of Rawull Pindee," and "G. Dalrymple Hay, Lieut.-Col. B.S.C."

The affidavit verifying the certificate was made by "Malcolm S. Laing, chaplain of Rawull Pindee, one of the commissioners mentioned in the certificate hereunto annexed:" but it was not signed by the deponent. The jurat, however, was as follows: "Sworn before me by the above Malcolm S. Laing, chaplain of Rawull Pindee, Punjab, East Indies, this 12th day of December, 1873. J. W. S. M'Call, Court magistrate and J.P."

In this affidavit the deponent stated that "the acknowledgment therein mentioned was made by the said Isabella, and the certificate signed by me and Lieutenant-Colonel G. J. Dalrymple Hay, of ———, in the ——— of ———, the other commissioner in the said certificate mentioned, on the day and year therein mentioned, at Rawull Pindee, in the Punjab of East Indies, in my presence."

The officer having declined to receive and file the documents without the order of the court or a judge, on the ground of the absence of complete identification of "Lieut.-Col. G. Dalrymple Hay" with the "Major George J. D. Hay" men-

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tioned in the commission, and also on the ground of the blanks in the affidavit of verification and the want of the signature of the deponent thereto, application was made to Archibald, J., at Chambers. That learned judge, without expressing any opinion, referred the matter to the court.

349] *There was a second commission of the same date, directing "William A. P. Wyllie, the major commanding the 9th brigade of Her Majesty's Royal Artillery, stationed at Secunderabad, East Indies, Pemberton Harrison, a lieutenant in the same brigade, and J. J. Fullarton Cumming, also a lieutenant in the same brigade, or any two of them," to take the acknowledgment of Julia, wife of William Ashcroft, quarter-master of the said 9th brigade, now stationed at Secunderabad," of the same deed. The certificate was signed by William A. P. Wyllie and Pemberton Harrison, two of the commissioners named: and the affidavit of verification, which was made by Pemberton Harrison, contained the same blanks as in the former case, and was also without the deponent's signature. The jurat, which was in the same form, was signed "R. L. Jones, magistrate and justice of peace for Secunderabad."

The officer for the same reasons declined to receive and file these documents:

Macrae-Moir moved that the officer be directed to receive and file the acknowledgments and affidavits, notwithstanding these irregularities. The omission of Col. Hay's place of abode in the affidavit of verification by his co-commissioner is cured by the statement in that affidavit that the acknowledgment therein mentioned was made by the party and the certificate signed by the deponent and by Col. Hay, "the other commissioner in the said certificate mentioned." Although the place of abode of Col. Hay is not filled in, he is sufficiently identified by his rank in the army (he having taken a step since the commission was sent out) and the number of his regiment. The omission of a deponent's addition in an affidavit was, in *Seymour v. Maddox* (¹), held to be a mere irregularity.

[BRETT, J.: Mr. Laing's affidavit seems to cure that defect.]

The next objection is that the deponent Laing has not *signed* the affidavit of verification. That, however, it is submitted, is cured by the rule of Court of Hilary Term, 1863, which provides that "with respect to acknowledgments of deeds by married women, taken in any colony or foreign possession being part of the dominions of Her Majesty, it is

(¹) 1 L. M. & P., 543.

ordered that affidavits verifying *the same made be- [350
for any court, or judge, magistrate, commissioner, notary
public, or other person authorized to administer an oath, and
containing in the jurat a statement by such court or judge,
magistrate, commissioner, notary public, or other person, of
the name or title of the office or authority which he or they
respectively hold and execute, shall be received as a suffi-
cient compliance with the requirements of 3 & 4 Wm. 4, c. 74,
s. 85, relating to affidavits of verification." It is enough,
therefore, that the affidavit is signed by the magistrate before
whom the deponent is sworn. In the case of *Re Eady* (*),
the affidavit was signed by the judge before whom it was
sworn, and not by the deponent, it being contrary to the
practice of the courts in Germany that any signature should
be attached to an affidavit except that of the judge before
whom the oath is administered: and the court allowed the
acknowledgment to be filed.

[LORD COLERIDGE, C.J.: There was evidence before the
court there that the course which had been adopted was that
which is regularly taken in Germany.]

It is enough if the court is fairly satisfied that the author-
ity delegated to the special commissioners has been duly
exercised, and that the requirement of the acts of Parliament
and of the rules of court have been substantially observed.

LORD COLERIDGE, C.J.: I think these documents may be
filed. The 3 & 4 Wm. 4 gives power to the Chief Justice of
this court, by s. 73, to appoint special commissioners for the
purpose of taking the acknowledgments of deeds by mar-
ried women in the colonies. We have before us a commis-
sion duly issued appointing William Chaine, major in the
4th Hussars, George Marriner, captain in the 58th regiment
of Foot, George J. D. Hay, major in Her Majesty's army,
and the Rev. M. S. Laing, chaplain in Her Majesty's army,
all residing at or near to Rawull Pindee, in the East Indies,
or any two of them, to take the acknowledgment of Isabella,
wife of Frederick Howard, of Rawull Pindee, sergeant in
the 4th Hussars. The deed is before us dated the 21st of
January, 1873: and there is a certificate, dated the 12th of
December, 1873, signed by Malcolm S. Laing, and G. J. Dal-
rymple Hay, "two of the *commissioners in the said [351
commission named," stating that Isabella Howard appeared
before them and produced an indenture bearing date the 21st
of January, 1873 (describing it), and duly acknowledged the
same. Then there is a document, which purports to be an
affidavit of verification made by "Malcolm S. Laing, chap-

(*) 6 Dowl., 615.

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lain of Rawull Pindee, one of the commissioners mentioned in the certificate hereunto annexed," who makes oath that "the acknowledgment therein mentioned was made by the said Isabella, and the certificate signed by me and Lieutenant-Colonel G. J. Dalrymple Hay, of ———, in the ——— of ———, *the other commissioner in the said certificate mentioned*, on the day and year therein mentioned, at Rawull Pindee, in the East Indies, in my presence." This affidavit is not signed by the deponent; but the jurat is as follows: "Sworn before me by the above Malcolm S. Laing, chaplain of Rawull Pindee, Punjab, East Indies, this 12th day of December, 1873. J. W. S. M'Call, court magistrate and J.P." There is, therefore, evidence before us that this acknowledgment was taken in the presence of two of the commissioners named in the special commission, and with all proper formalities, provided that this was a sufficient affidavit. Now, s. 85 of 3 & 4 Wm. 4, c. 74, enacts that "every such certificate as aforesaid [prescribed by s. 84] of the taking of an acknowledgment by a married woman of any such deed as aforesaid [see s. 77], together with an affidavit by some person verifying the same and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with some officer of the Court of Common Pleas at Westminster, to be appointed as hereinafter [s. 89] mentioned; and such officer shall examine the certificate, and see that it is duly signed either by some judge or master in chancery, or by two commissioners appointed pursuant to this act [s. 73], and duly verified by affidavit as aforesaid, and shall also see that it contains such statement of particulars as to the consent of the married woman as shall from time to time be required in that behalf; and, if all the requisites of this act in regard to the certificate shall have been complied with, then such officer shall cause the said certificate and the affidavit to be filed of record in the said Court of Common Pleas." 352] The question is whether that enactment has *been complied with. The affidavit of verification is not signed by the deponent. That is, upon the face of it, an irregularity. But the jurat shows that it was duly sworn by the commissioner (Laing) before a person properly qualified. And the rule of Court of Hilary Term, 1863, to which we have been referred, provides that affidavits verifying certificates of acknowledgments of deeds by married women, taken in any colony or foreign possession being part of the dominions of Her Majesty, "made before any court or judge, magistrate, commissioner, notary public, or other person authorized to administer an oath, and containing in the jurat a statement by such

court or judge, magistrate, commissioner, notary public, or other person, of the name or title of the office or authority which he or they respectively hold and execute, shall be received as a sufficient compliance with the requirements of 3 & 4 Wm. 4, c. 74, s. 85, relating to affidavits of verification." We have here a statement by a person competent to make it, that this affidavit, though not signed by the deponent, was duly sworn before a magistrate having authority to take affidavits; and that, I think, is evidence upon which we can properly say in this case that the provisions of the act of Parliament have been complied with. In the case of *Re Eady* (¹), the affidavit was signed by the judge and not by the deponent, it being contrary to the practice of the courts in Hamburg that any signature should be attached to an affidavit except that of the judge before whom the oath is administered. The court, however, required that fact to be verified by affidavit; Tindal, C.J., observing that, "to the eye of a person merely looking at the affidavits, the evidence would otherwise appear incomplete." Here, we are asked to go a step further; but it is to be observed that that case occurred before the rule of Court of Hilary Term, 1863. I am of opinion that, having regard to that case and to the rule, there is enough here to cure the defect. The documents may, therefore, be received and filed.

The circumstances of the two cases being identical, the rule may go in both of them.

BRETT, J.: The law requires that the acknowledgment of a deed "by a married woman "in any colony or for- [353 eign possession, being part of Her Majesty's dominions," shall be taken before special commissioners appointed by the Lord Chief Justice of the Court of Common Pleas, who are to certify under their hands that she has duly acknowledged the deed; and that there shall be an affidavit,—which affidavit may be made, where it is found convenient, by one of the commissioners—verifying the certificate of acknowledgment. Here, we have a certificate assuming to be signed by two of the commissioners, and an affidavit purporting to be made by one of them, "that the acknowledgment therein mentioned was made by the married woman, and the certificate signed by him and by Lt.-Col. G. J. Dalrymple Hay, of——, the other commissioner in the certificate mentioned," on the day and year therein mentioned, in his presence. This affidavit was objected to upon two grounds,—first, that it did not sufficiently identify one of the commissioners, inasmuch as his place of residence was not men-

(¹) 6 Dowl., 615.

tioned: but I think that defect is cured by the statement that he is "the other commissioner in the certificate mentioned." The second objection is that this was no affidavit at all, or no sufficient affidavit, because it does not bear the signature of the deponent. Now, in this country, the signature of the deponent to every affidavit is required, and an affidavit without signature is irregular. The question, therefore, is, whether that irregularity is sufficiently got over here. The rule of Hilary Term, 1863, provides that, where the acknowledgment is taken in a British colony, the affidavit verifying the same, made before any court or judge, magistrate, commissioner, notary public, or other person authorized to administer an oath, and containing in the jurat a statement by such court, judge, magistrate, &c., of the name or title of office or authority which he or they respectively hold and execute, shall be received as a sufficient compliance with the requirements of 3 & 4 Wm. 4, c. 74, s. 85, relating to affidavits of verification." Here, the jurat is signed by a magistrate, with a description of the office or authority which he holds; and he states that the affidavit was sworn before him by the deponent at the time and place mentioned. I think that is enough to satisfy us that the affidavit was duly sworn by one of the commissioners, pursuant to the *requirement of the rule of Hilary Term, 4 Wm. 4, and cures the irregularity. The court, no doubt, has always looked strictly to these proceedings, relating as they do to the conveyance of property by persons who especially require protection. But, there must be some limit to that strictness; and, where commissions are sent out to remote places to be executed by persons who are generally not very conversant with business of this sort, it is obvious that some relaxation of the stringency of our rules may reasonably be allowed, where enough appears to satisfy the court that the act of Parliament has been substantially complied with. I agree with my lord that we are going a step further than the court went in the case of *Re Eady*⁽¹⁾; but, under the circumstances, I think we are justified in granting this application.

DENMAN, J.: I agree with my lord and my Brother Brett in thinking that this application may be granted; though at the same time I must say that the officer was quite right in declining to receive and file these documents without the sanction of the court. The only question of any difficulty is, whether an affidavit which is not signed by the deponent is an affidavit at all. *Re Eady*⁽¹⁾ shows that, under certain

⁽¹⁾ 6 Dowl., 615.

circumstances, signature may be dispensed with. That case, coupled with the rule of Hilary Term, 1863, I think warrants us in granting this application. It is to be observed that there is nothing in the form given in the rules of Hilary Term, 4 Wm. 4, to indicate that a signature is necessary; and this may have misled the parties.

Rule granted.

Attorneys for applicants: *Doyle & Edwards.*

If the officer do not affix his signature to the jurat of an affidavit it is invalid: *Low v. Groom*, 1 Denio, 429; *Bill v. Bament*, 8 Meeson & Welsby, 817. Otherwise if the affiant's signature be wanting to an affidavit in fact sworn to by him: *Soule v. Chase*, 1 Abb. Prac. Rep. N. S., 48, 1 Robertson, 222, affirmed, without anything being said upon this subject, 89 New York, 342.

[Law Reports, 9 Common Pleas, 355.]

April 30, 1874.

***PETROCOCHINO and Others v. BOTT. [355]**

Shipping—Construction of Bill of Lading—Usage of the Port of London as to the Discharge of Goods from Steamers in the Docks.

Goods were shipped under a bill of lading in these terms: "Shipped in good order and condition by Petrocochino Brothers, of Calcutta, in the steamer Zeno, bound for London, sixty-nine bales of hides, being marked and numbered as per margin, and to be delivered in the like good order and condition from the ship's deck, *where the ship's responsibility shall cease*, at the aforesaid port of London," &c., "on payment of freight," &c.

On her arrival in London the Zeno went into the Victoria Docks, and notice was given to the consignees that she was ready to unload. The custom of the Victoria Docks as to the unloading of steamers was proved to be as follows: The goods are taken from the deck of the vessel by the company's servants and placed on the dock quay, or, if perishable, under sheds, and, if the consignee or his agent does not appear to claim them within twenty-four hours, they are warehoused by the company. If the consignee or his agent sends a lighter, they are put into the lighter from the quay by the servants of the company. The expenses of landing the goods and putting them into lighters are paid by the shipowner, but if the goods are warehoused, this is done at the expense of the owner of the goods.

Within the proper time the consignees of the sixty-nine bales sent a lighter for them. The whole sixty-nine were proved to have been landed by the company's servants and placed on the quay; but the evidence failed to satisfy the jury that more than sixty-eight were put into the lighter. The other bale was never traced:

Held, that the shipowner was not responsible for the missing bale.

THE first count of the declaration stated that the plaintiffs shipped on board a ship of the defendant, called the Zeno, hides to be carried from Calcutta to London, and there delivered, on the terms of a bill of lading, as follows:

"Shipped in good order and condition by Petrocochino Brothers, of Calcutta, in the steamer Zeno . . . bound for London, sixty-nine bales hides, being marked and numbered as per margin, and to be delivered in the like good order and condition from the ship's deck, *where the ship's responsibility shall cease*, at the aforesaid

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port of London, or so near thereto as she may safely get (the act of God, &c., being excepted), unto Messrs. Petrocochino Brothers, or his or their assigns, on payment of freight.

"Weight, contents and value unknown. The goods to be discharged from the ship as soon as she is ready to unload into hulk, lazaretto, or hired lighters, if necessary, and to be landed by the master and agent at the risk and expense of the owners of the goods."

Breach, that, although the defendant delivered to the 356] plaintiffs *part of the said goods in accordance with the terms of the bill of lading, he did not deliver the remainder.

There was also a count for the conversion of one bale of hides.

Pleas, 1. To the first count, that the goods were not shipped on board the defendant's ship, as alleged; 2. To the first count, a denial of the alleged breach; 3. To the first count, that the goods were delivered from the ship's deck, within the true intent and meaning of the bill of lading; 4. To the second count, not guilty; 5. To the second count, not possessed. Issue thereon.

The cause was tried before Brett, J., at the sittings in London after Hilary Term, 1873. The plaintiffs are merchants carrying on business in London, and the defendant is also a shipbroker also carrying on business in London, and was the charterer of the *Zeno*. It was admitted that sixty-nine bales of hides were shipped by the plaintiffs at Calcutta on board the *Zeno*, in March, 1872, as stated in the bill of lading. These sixty-nine bales were marked and numbered as follows:

The whole of them were marked PB; 30 of them were also marked P S, and numbered 249 to 278; 25 were marked ^{C S}, and numbered 279 to 303; and the remaining 14 were marked M S, and numbered 4 to 17.

It was proved to be the course of business for steamers arriving in the Victoria Docks to give immediate notice thereof to the owners or consignees of the goods on board; and the goods are then landed by the servants of the dock company and placed on the quay, or, if they are perishable, under sheds; and if the consignee or his agent does not appear to claim the goods within twenty-four hours, they are warehoused by the dock company. If the consignee or any person appointed to receive the goods sends a lighter, they are put into the lighter from the quay by the servants of the dock company; the expenses of landing the goods and putting them into lighters are paid by the shipowner; but, if the goods are warehoused by the dock company, this is done at the expense of the owner of the goods. It is the

duty of a custom-house officer to go on board and see that nothing remains after the ship is unloaded; and this was proved to have been done.

*On the arrival of the *Zeno* on the 4th of May, 1872, [357 notice was given in the usual way to the plaintiffs as consignees of the sixty-nine bales in question, and also to the consignees of 383 other bales brought by the same ship; and lighters were in due course sent by Messrs. Culverwell & Co. to receive the whole of the hides, of which twenty-five bales were to be put on board the steamship *Gould*, and the remainder to be conveyed to *Sun Wharf*, a wharf in the *Thames* belonging to Culverwell & Co., to be warehoused.

Thompson, the warehousekeeper at *Victoria Docks*, whose duty it was to superintend the landing and delivery of the goods, stated that he delivered into the lighters sent by Culverwell & Co. all the bales of hides which he could find with the marks and numbers given to him, all of which went to *Sun Wharf*, and amongst which were twenty-five bales marked P. B. put on board the barge *Ladore* on the 6th of May, seventeen on board the *Jason* on the 8th of May, six on board the *Kent* on the 14th of May, and one on board the *Nestor* on the 30th of May,—all similarly marked. He proved that 452 bales in all left the *Victoria Dock* in the lighters sent by Culverwell & Co.

The superintendent of the *Sun Wharf* proved that 427 bales only were received by him at the wharf, and that twenty-five were put on board the *Gould*. Of the sixty-nine bales marked P. B. and consigned to the plaintiffs, sixty-eight only were found on board the lighters; one bale, numbered 266, was never traced. None of the lightermen were called.

On the part of the defendant it was submitted that, the shipowner having landed the hides on the dock quay for his own convenience and at his own expense, and the agents of the consignees being there within a reasonable time ready to receive them, the delivery on the quay was not a delivery to the consignees.

The learned judge ruled that, according to the terms of the bill of lading, and the usage of the port of London, as soon as the goods left the ship's deck the shipowner's responsibility was at an end,—the delivery was then complete according to the terms of the contract. The goods then remained in the custody and care of the dock company until they could in the usual course of business be put into lighters or be warehoused. He then left the following questions to the jury: 1. Were these sixty-nine bales marked

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358] P. B. *delivered from the ship to the dock company on the quay? 2. Were the sixty-nine bales marked P. B. delivered by the dock company's servants into the lighters sent by Culverwell & Co.?

The jury having answered the first of these questions in the affirmative and the second in the negative, the learned judge directed a verdict to be entered for the defendant, reserving leave to the plaintiffs to move to enter a verdict for them for £41, the agreed value of the missing bale, and also reserving leave to the defendant to move on the ground that the finding of the jury on the second question was against the weight of evidence.

Thesiger, Q.C., in Easter Term last, obtained a rule *nisi* to enter a verdict for the plaintiffs for £41, on the ground that the second finding of the jury amounted in law to a verdict for the plaintiffs; or for a new trial, on the ground that the first finding was against the weight of evidence,—the defendant on the argument of the rule being at liberty to contend that the second finding of the jury was against the weight of evidence.

Jan. 24. *Cole*, Q.C., and *R. E. Webster*, showed cause: By the express terms of the bill of lading the shipowner's responsibility was at an end the moment the hides left the ship's deck. According to the course of business at the Victoria Docks, steamers are at once unloaded by the servants of the company, not into lighters, but on to the quay; the dock company being for this purpose the agents of both parties. The fact that the landing charges are paid by the shipowner is immaterial. When the goods are placed on the quay, the shipowner has lost all dominion over them; his lien and his responsibility are both gone. There was abundant evidence to show that all the bales which were on board the *Zeno* were unloaded and placed on the quay. It has never been disputed that a delivery according to the custom of the port of London discharges the shipowner. In *Gatliffe v. Bourne* (¹), *Tindal*, C.J., says: "We know of no general rule of law which governs the delivery of goods under a bill of lading, where such delivery is not expressly in accordance with the terms of the bill of lading, except that it must be a delivery according to the practice and custom usually observed in the port or place of delivery"—359] *following out the dictum of *Buller*, J., in *Hyde v. Trent and Mersey Navigation Co.* (²)

(¹) 4 Bing. N. C., 314, 329.

(²) 5 T. R. 389, 397: "A ship trading from one port to another has not the means of carrying the goods on land; and,

according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the carrier."

Thesiger, Q.C., and *Graham*, in support of the rule: By the bill of lading the goods were to be delivered in London "unto Messrs. Petrocochino Brothers, or their assigns." The dock company are not "assigns," neither are they in any sense the agents of the consignees. For the services performed by them in respect of the goods, they are paid by the shipowner. He gets no discharge from the dock company on landing the goods on the quay; whereas, if he had delivered into lighters, as contemplated by the bill of lading, he would have had the lighterman's receipt. The receipts given by the lightermen to the dock company in this case express the delivery to have been "overside."

BRETT, J.: Suppose application to be made for goods by the consignee within twenty-four hours after notice, and from some cause the dock company are unable to deliver them, is the shipowner still answerable for them?

No doubt he is. If the goods had been delivered into lighters,—which was the mode of unloading here contemplated—the shipowner's liability would have continued until the delivery was complete: *Catley v. Wintringham* ('). The finding upon the second question left to the jury was against the weight of evidence.

April 30. The judgment of the majority of the court (Brett and Denman, JJ.), was delivered by

BRETT, J.: This case was argued in Hilary Term last, before my Brothers Denman and Honyman and myself. It stood over in consequence of a doubt entertained by my Brother Honyman. As, unfortunately, we do not expect to have the benefit of his assistance for some time, my Brother Denman and myself feel bound to pronounce our decision on the case without any further delay.

The action was brought to recover damages for a breach of contract, in not delivering goods according to a bill of lading. The *bill of lading was for sixty-nine bales of [360 hides to be carried from Calcutta to London, "to be delivered from the ship's deck, where the ship's responsibility shall cease." On the arrival of the ship in London, she was taken into the Victoria Docks, and notice was given to the consignees of the hides that she was ready to discharge her cargo. The hides were immediately unloaded and placed on the quay. This was done by the servants of the dock company and in the absence of the consignees or their agents. Certain of the goods were then forwarded in barges sent by the consignees to Sun Wharf, a wharf in the river Thames. It was proved on the trial before me that the sixty-nine bales

(') Peake [150], 202.

in question were delivered from the ship to the dock company; but there was evidence which satisfied the jury that one of the bales was not delivered by the company on board the lighters. It is obvious, therefore, that after the goods had left the ship's deck one bale was by some means lost. Its value was £41.

On the part of the consignees it was argued that the defendant, the shipowner, was liable for the loss, on the ground that he had failed to deliver that one bale to the consignees or their agents; that the delivery of the goods to the dock company was a thing done for the convenience and at the expense of the shipowner; and that, if any of the goods were lost through the negligence of the dock company, the shipowner was responsible for it. On the other side it was contended that, according to the true interpretation of the bill of lading, the shipowner was not responsible in any way for the goods after they had left the ship's deck; and the jury have expressly found that the proper number of bales had left the deck.

Now, the terms of the bill of lading (which is not in the ordinary form) are these,—“Shipped in good order and condition by Petrocochino Brothers, of Calcutta, in the steamer Zeno, bound for London, sixty-nine bales hides, being marked and numbered as per margin, and to be delivered in the like good order and condition from the ship's deck, *where the ship's responsibility shall cease*, at the aforesaid port of London,” &c.

The general principle seems to be that, where goods are consigned to a particular port, delivery is to be made according to the usage which prevails at that port. For in-361] stance, where *goods are to be delivered “at the port of Cardiff,” the shipowner's contract is fulfilled if he delivers them at the particular part of the port where goods of that class are required to be delivered. So, if delivery is by the usage of the port to be made in a certain manner, a delivery in that manner satisfies the shipowner's undertaking to deliver at the port, unless there be something in the terms of the contract inconsistent with it.

At the trial of this case, witnesses for the plaintiffs gave evidence of the usage of the Victoria Docks. That usage was thus stated: When a steamer arrives in the dock, notice is given to the consignees of the goods on board; and the goods are landed from the ship on to the quay by the servants of the company, the shipowner not interfering. If the consignees apply for the goods within twenty-four hours, they get them from the quay free of charge,—not from the ship

into the lighters, but from the quay; the goods being put into the lighters by the servants of the company. For this service the shipowner pays. If the consignees do not apply for the goods within twenty-four hours, they are warehoused by the dock company, and the consignees pay the charge for warehousing. Thus, the mode and manner of delivery of goods according to the usage of the port of London is, not an immediate delivery from the ship to the consignee, but from the ship to the quay, and from the quay to the consignee. Having regard to that usage this bill of lading is drawn. It seems to me that it could not more accurately describe the mode of delivery from the ship's deck to an intermediate place of delivery. That being so, according to the true construction of this bill of lading, I am of opinion that the moment the shipowner has cleared the goods from the deck, he ceases to be responsible in any way for them; and that, whatever remedy the plaintiffs may have against the dock company, or any one else, they cannot under the circumstances charge the shipowner with the loss of the bale in question.

The rule to enter the verdict for the plaintiffs will therefore be discharged.

DENMAN, J.: I will only add that I never entertained a doubt, but that my Brother Honyman was not altogether clear which way the decision ought to be. I should have been very glad if we *could have obtained his ultimate [362] views of the matter, though the result of the rule would have been still the same.

Rule discharged.

Attorneys for plaintiffs: *Markby & Tarry.*

Attorneys for defendant: *Lowless, Nelson & Jones.*

[Law Reports, 9 Common Pleas, 362.]

April 30, 1874.

CLIFFORD v. HOARE.

Construction of Covenant—Easement—Right of Way—Party or Privy.

The plaintiff purchased two of several plots of building land of which the defendant was mortgagee in fee. The conveyance, to which the defendant and the mortgagor were both parties, contained a grant of a right of way in these terms,—“Together with full and free right and liberty for the grantee, his heirs, &c., at all times and for all purposes, &c., with or without horses, carriages, &c., to pass and repass over and along the roads or intended roads and ways delineated in the plan,” and also a covenant by the defendant that he had not “done, omitted, or knowingly suffered or been party or privy to anything whereby the premises conveyed, or any part thereof, were or might be impeached, affected, or incumbered in title, estate, or otherwise

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howsoever, or whereby he was in anywise hindered from granting and releasing the same premises, or any part thereof, in manner aforesaid."

Another plot had previously been sold to A. In the conveyance to A. (to which the defendant as mortgagee was a party), *the mortgagor* covenanted with A. that he would at his own expense "pave and complete and make fit for use, and at all times maintain in good repair, a private road, the site of which private road is marked 'Private Road A B' on the plan drawn in the margin of these presents (describing it), and will make such road of a width of not less than forty feet throughout its entire length." This was the road over which a right of way was granted to the plaintiff in his conveyance. In this deed was also a proviso that it should be lawful for A. "to erect and maintain a *porte-cochère* or projection extending over the foot-pavement of the said private road marked A B, provided that the plan thereof be submitted to the mortgagor, and approved of by him." This portico when finished projected about two feet into the carriage-way of the private road A B, but there was ample space left for the convenient enjoyment by the plaintiff of the way granted to him:

Held, that, there being no substantial interference with the right of way or easement granted to the plaintiff, he was not entitled to maintain an action against the defendant upon his covenant; but that, if there had been such interference with any right of the plaintiff, however small the damage, the defendant was sufficiently a "party or privy" to the conveyance to A. as to have rendered him liable.

THIS was an action brought to recover damages for the breach of a covenant in an indenture dated the 2d of August, 363] 1872, and *made between the plaintiff and defendant as hereinafter appears, whereby a right of way was granted to the plaintiff in the manner therein set forth.

The cause came on to be tried before Bovill, C.J., at the sittings in Middlesex after Hilary Term, 1873, when a verdict was by consent entered for the plaintiff for the damages in the declaration, subject to the opinion of the court upon the following case:

1. The plaintiff was formerly a colonel in the guards, but is now yeoman usher of the black rod in the House of Lords; the defendant is a banker in London.

2. Mr. Mitchell Henry, at the dates of the execution of the two indentures hereinafter mentioned, was possessed of an estate called the Kent House Estate, at Kensington, and had borrowed money on the security thereof from the defendant, who thereupon became mortgagee in fee.

3. In the spring of 1872, Lady Ashburton negotiated with Mr. Mitchell Henry for the purchase by her of a portion of the Kent House Estate, which portion consisted of the plot of land colored pink on a plan annexed to the case; and by indenture of the 17th of May, 1872, the plot was duly conveyed to Lady Ashburton, and the defendant became a party to the indenture, as mortgagee. By that indenture Lady Ashburton was empowered to erect a *porte-cochère* or projection on the west side of her proposed house, in these terms:—"And further, that it shall be lawful for Lady Ashburton, her heirs or assigns, to erect and maintain a bow or projection on the first, and (if desired by her or them)

also on the upper floors of the messuage or dwelling-house thereafter covenanted to be erected by her (but only on the western side of the said piece or parcel of ground first thereinbefore described), provided that no such bow or projection shall be made over the private road marked A B on the plan, at a greater distance from the Kensington Road than 100 feet: And also that it shall be lawful for Lady Ashburton, her heirs and assigns, to erect and maintain a *porte-cochère* ⁽¹⁾ or projection extending from the west side of the last-mentioned messuage or dwelling-house over the foot-pavement of the said private road marked A B: provided that the plan of any projection or projections be submitted to the *said Mitchell Henry, his heirs or assigns, [364 and approved of by him or them.”

4. Previously to the 17th of May, 1872, the plaintiff and his wife, who had learnt that the property was to be sold in building plots, were in treaty for the purchase of the plots colored blue on the plan ⁽²⁾; and on the 24th of May they entered into a contract with Mr. Mitchell Henry for the purchase thereof, and it was afterwards conveyed to them by indenture of the 2d of August, 1872, to which the defendant as mortgagee was a party.

5. By the indenture of the 2d of August, 1872, there was, amongst other things, granted to the plaintiff a right of way as follows,—“Together also with full and free right and liberty for Clifford, his heirs and assigns, and his and their friends, servants, and workmen, and the respective tenants and occupiers for the time being of the said pieces or parcels of land and any buildings to be erected thereon respectively, and all and every other persons and person, for the benefit and advantage of Clifford, his heirs or assigns, from time to time and at all times hereafter at his and their will and pleasure, and by night and by day, and for all purposes, either with or without horses, carts, and carriages, to pass and repass over and along the roads or intended roads and ways which or the intended directions whereof are respectively delineated on the said plan and are thereon colored brown and green respectively.”

And by the same indenture the defendant covenanted as follows: “And the said P. R. Hoare doth hereby, for himself, his heirs, executors, and administrators, covenant with Clifford, his heirs and assigns, that the said P. R. Hoare hath not done, omitted, or knowingly suffered, or been

⁽¹⁾ Meaning a “portico.” So called in subsequent paragraphs.

⁽²⁾ One being next adjoining the land of Lady Ashburton, the other at the end of the private road A B.

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lain of Rawull Pindee, one of the commissioners mentioned in the certificate hereunto annexed," who makes oath that "the acknowledgment therein mentioned was made by the said Isabella, and the certificate signed by me and Lieutenant-Colonel G. J. Dalrymple Hay, of ———, in the ——— of ———, *the other commissioner in the said certificate mentioned*, on the day and year therein mentioned, at Rawull Pindee, in the East Indies, in my presence." This affidavit is not signed by the deponent; but the jurat is as follows: "Sworn before me by the above Malcolm S. Laing, chaplain of Rawull Pindee, Punjab, East Indies, this 12th day of December, 1873. J. W. S. M'Call, court magistrate and J.P." There is, therefore, evidence before us that this acknowledgment was taken in the presence of two of the commissioners named in the special commission, and with all proper formalities, provided that this was a sufficient affidavit. Now, s. 85 of 3 & 4 Wm. 4, c. 74, enacts that "every such certificate as aforesaid [prescribed by s. 84] of the taking of an acknowledgment by a married woman of any such deed as aforesaid [see s. 77], together with an affidavit by some person verifying the same and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with some officer of the Court of Common Pleas at Westminster, to be appointed as hereinafter [s. 89] mentioned; and such officer shall examine the certificate, and see that it is duly signed either by some judge or master in chancery, or by two commissioners appointed pursuant to this act [s. 73], and duly verified by affidavit as aforesaid, and shall also see that it contains such statement of particulars as to the consent of the married woman as shall from time to time be required in that behalf; and, if all the requisites of this act in regard to the certificate shall have been complied with, then such officer shall cause the said certificate and the affidavit to be filed of record in the said Court of Common Pleas." 352] The question is whether that enactment has *been complied with. The affidavit of verification is not signed by the deponent. That is, upon the face of it, an irregularity. But the jurat shows that it was duly sworn by the commissioner (Laing) before a person properly qualified. And the rule of Court of Hilary Term, 1863, to which we have been referred, provides that affidavits verifying certificates of acknowledgments of deeds by married women, taken in any colony or foreign possession being part of the dominions of Her Majesty, "made before any court or judge, magistrate, commissioner, notary public, or other person authorized to administer an oath, and containing in the jurat a statement by such

court or judge, magistrate, commissioner, notary public, or other person, of the name or title of the office or authority which he or they respectively hold and execute, shall be received as a sufficient compliance with the requirements of 3 & 4 Wm. 4, c. 74, s. 85, relating to affidavits of verification." We have here a statement by a person competent to make it, that this affidavit, though not signed by the deponent, was duly sworn before a magistrate having authority to take affidavits; and that, I think, is evidence upon which we can properly say in this case that the provisions of the act of Parliament have been complied with. In the case of *Re Eady* (¹), the affidavit was signed by the judge and not by the deponent, it being contrary to the practice of the courts in Hamburg that any signature should be attached to an affidavit except that of the judge before whom the oath is administered. The court, however, required that fact to be verified by affidavit; Tindal, C.J., observing that, "to the eye of a person merely looking at the affidavits, the evidence would otherwise appear incomplete." Here, we are asked to go a step further; but it is to be observed that that case occurred before the rule of Court of Hilary Term, 1863. I am of opinion that, having regard to that case and to the rule, there is enough here to cure the defect. The documents may, therefore, be received and filed.

The circumstances of the two cases being identical, the rule may go in both of them.

BRETT, J.: The law requires that the acknowledgment of a deed *by a married woman "in any colony or foreign possession, being part of Her Majesty's dominions," shall be taken before special commissioners appointed by the Lord Chief Justice of the Court of Common Pleas, who are to certify under their hands that she has duly acknowledged the deed; and that there shall be an affidavit,—which affidavit may be made, where it is found convenient, by one of the commissioners—verifying the certificate of acknowledgment. Here, we have a certificate assuming to be signed by two of the commissioners, and an affidavit purporting to be made by one of them, "that the acknowledgment therein mentioned was made by the married woman, and the certificate signed by him and by Lt.-Col. G. J. Dalrymple Hay, of——, the other commissioner in the certificate mentioned," on the day and year therein mentioned, in his presence. This affidavit was objected to upon two grounds,—first, that it did not sufficiently identify one of the commissioners, inasmuch as his place of residence was not men-

(¹) 6 Dowl., 615.

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367] *Squire v. Campbell* (¹), and *Child v. *Douglas* (²). Then, the defendant was no party to the covenant under which Lady Ashburton was permitted to erect this portico. It is true he was a formal party to the deed which contained that covenant, but he could not therefore be said to have "knowingly suffered or been party or privy to" that covenant.

Philbrick, Q.C., in reply : It is impossible to say that the defendant was not party or privy to the deed of the 17th of May, 1872, under which Lady Ashburton was enabled to erect the portico complained of : *Hobson v. Middleton* (³). The main question is whether the plaintiff has had the thing he bargained for ; if not, he is clearly entitled to maintain this action.

LORD COLERIDGE, C.J. : I am of opinion that our judgment in this case ought to be for the defendant. The action is brought upon a covenant contained in a deed of the 2d of August, 1872. It was a conveyance of two parcels of land of which the legal estate was in the defendant, and the beneficial or equitable interest in Mr. Mitchell Henry (both of whom were parties to the deed), to Colonel Clifford, the plaintiff. The deed contained a recital that "it was further agreed that such conveyance should be made of the said pieces or parcels of land, with the appurtenances and rights of way as thereafter appearing." After describing the parcels, the conveyance goes on, "Together also with full and free right and liberty for Colonel Clifford, his heirs and assigns, and for his and their friends, servants, workmen, &c., from time to time and at all times hereafter at his and their will and pleasure, &c., with or without horses, carts, and carriages, to pass and repass over and along the roads or intended roads and ways which or the intended directions whereof are respectively delineated on the plan," &c. That is a conveyance of the premises with a right of way,—an easement. No question arises, or could arise, as against Mr. Mitchell Henry, the equitable owner. But the defendant, who is a party to the deed as legal owner, enters into a covenant to this effect, "that he the said P. R. Hoare hath not done, omitted, or knowingly suffered, or been party or privy to anything whereby the said premises hereinbefore expressed to be hereby by him granted and released, or any 368] part thereof, are, *is, or may be impeached, affected, or incumbered in title, estate, or otherwise howsoever, or whereby he is in anywise hindered from granting and re-

(¹) 1 My. & Cr., 459.

(²) Kay, 560.

(³) 6 B. & C., 295.

leasing the same premises, or any part thereof, in manner aforesaid." Thus, the defendant, on the 2d of August, 1872, covenants that he has not done, omitted, or knowingly suffered or been party or privy to anything whereby the grant of the easement to Colonel Clifford has been "impeached or affected." It is said that the defendant has been guilty of a breach of that covenant, because he had on the 17th of May, 1872, been party or privy to a deed under which Lady Ashburton had been allowed to obstruct and diminish the enjoyment of the right of way or easement so granted to the plaintiff. In order to see whether or not that amounts to a breach of the defendant's covenant with Colonel Clifford, it will be necessary to see what are the covenants contained in the prior conveyance to Lady Ashburton, to which Mr. Mitchell Henry and the defendant also are both parties. After several recitals which it is not material to notice, the operative part of the deed is the grant to Lady Ashburton of another portion of the same estate, together with a right of way upon which no question turns. There is then a covenant similar to that in the conveyance of the 2d of August, 1872, "that the said P. R. Hoare has not executed or done, or knowingly suffered or been party or privy to, any deed or thing whereby or by reason or means whereof the premises hereinbefore granted or expressed so to be, or any of them, or any part thereof, are, is, or may be impeached, charged, or incumbered in title, estate, or otherwise howsoever." And then comes this important covenant,— "And further, that he the said Mitchell Henry, his heirs or assigns, will before the 17th of January, 1873, at his or their own expense, construct, pave, and complete and make fit for use, and at all times (until the burthen thereof shall have been adopted by some competent public authority) maintain in good repair, a private road on the western side of the said piece or parcel of ground first hereinbefore described, the site of which private road is marked 'Private Road A B' on the said map or plan drawn in the margin of these presents, and which said road runs from the high road leading from Kensington to London, along the western boundary of the said piece or parcel of ground first hereinbefore described, to the ground in the rear of *Montpelier Square, and will make such road of a [369 *width of not less than forty feet* (') *throughout its entire*

(') The plan showed that this forty-foot road at the spot in question was intended to be laid out thus,—a carriage-way of twenty-four feet eight inches, and

a footway of five feet on either side, the rest being greensward or shrubbery enclosed by a dwarf wall and iron railing.

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length." Then there follows this proviso, that "it shall be lawful for Lady Ashburton, her heirs or assigns, to erect and maintain a bow or projection on the first and (if desired by her of them) also on the upper floors of the messuage or dwelling-house hereinafter covenanted to be erected by her (but only on the western side of the said piece or parcel of ground first hereinbefore described), provided that no such bow or projection shall be made over the private road marked A B on the said map or plan at a greater distance from the Kensington Road than 100 feet; and also that it shall be lawful for the said Lady Ashburton, her heirs and assigns, to erect and maintain a *porte-cochere* or projection extending from the west side of the said last-mentioned messuage or dwelling-house over the foot-pavement of the said private road marked A B, provided that the plan of any projection or projections be submitted to the said Mitchell Henry, his heirs or assigns, and approved of by him or them." Mr. Mitchell Henry, therefore, in a deed to which the defendant is a party, covenants to make the road marked A B of the minimum width of forty feet, and he also covenants that Lady Ashburton shall be permitted to erect a portico over the foot-path, provided the designs are submitted to and approved of by him. The erection complained of as a breach of the defendant's covenant with the plaintiff is this portico. It is said to be an infringement of the right of way granted to the plaintiff by the deed of the 2d of August; and it is further said that, as the defendant was a party to both deeds, he has broken his covenant with the plaintiff, because in May, 1872, he was party to a deed whereby the easement granted to the plaintiff by the deed of August was affected.

Two points were raised on the argument,—first, whether there has been an interference with the right granted to the plaintiff by the deed of the 2d of August, 1872; secondly, if there has, whether the defendant is brought within the words of that covenant, he having merely joined in the 370] deed of the 17th of May, *1872, for conformity, and not as a party or privy in the sense contemplated by that covenant.

Now, the first point raises by far the most important consideration in the case. In order to determine that, it is necessary to look carefully at the words of the deed, to see what it is that was conveyed to the plaintiff. The obstruction cannot now be removed. It is not suggested that the damage is appreciable in money; but the parties are standing upon their legal rights. We have nothing to do with

the merits; and, if the defendant has broken his covenant, however infinitesimal the injury sustained by the plaintiff may be, the action is maintainable. Now, the thing granted is admitted to be an easement. The limits of the right are ascertained by the deeds. According to the covenant entered into by Mr. Mitchell Henry with Lady Ashburton, the road is to be forty feet wide. It is enough to say that that covenant has been performed; a road of the stipulated width has been properly made. Now, what right or easement did the plaintiff acquire in reference to that road? A right for himself and his friends, servants, and workmen, to pass and repass over and along the roads or intended roads and ways delineated on the plan. It was pointed out in the course of the argument that that could not be an absolute grant of every part of the road for all the purposes mentioned; part must be set out for a carriage-way and part for a footway. What has the plaintiff got? As far as the carriage-way is concerned, he has all he bargained for, except that the bases of the columns supporting the portico encroach a little upon it. If this had been an absolute conveyance of a forty-foot road set out by metes and bounds, and a portion of it had been obstructed by the conveying party, no doubt an action might have been maintained for that trespass. But that is not this case; that which is granted is a right of way, an easement, over a road the soil of which remains in the grantor. All deeds are to be construed according to the intention of the parties as expressed therein: and we gather from the language of this deed that the intention was to grant the plaintiff an easement only, the reasonable use and enjoyment of an ascertained way; and it is not suggested that the plaintiff has not such reasonable enjoyment. Upon the statements in the special case, it does not appear that the plaintiff has not got in the fullest sense that which the *deed purported to convey to him. If [371 so, it follows that this action, which is brought upon the covenant by the defendant that he has not done, omitted, or knowingly suffered, or been party or privy to anything whereby that easement might be impeached or affected cannot be sustained.

It becomes, therefore, unnecessary to consider what we should hold as to the second point. But, as the question has been raised before us, I may say that, if I had thought that the construction of the covenant was adverse to the defendant, I should have felt no difficulty in coming to the conclusion that he was party or privy to the deed by which the covenant had been infringed. He had notice of the con-

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tents of the deed of the 17th of May, 1872, and was a party and a necessary party thereto. If any authority were wanting upon this point, it seems to me that *Hobson v. Middleton* ⁽¹⁾ is sufficient for the purpose. If, therefore, our judgment had been against the defendant upon the first point, it would probably have been against him upon the second point also.

BRETT, J.: I am of the same opinion. It is admitted that the portico cannot now be got rid of; and it seems that the plaintiff has sustained no real damage. As to the second point, I agree with my lord that, if the plaintiff's rights have been infringed, the defendant was sufficiently party or privy to the deed under which that was done to make him liable. As to the first point,—that which is granted to the plaintiff by the conveyance of the 2d of August, 1872, was, not a forty-foot road, nor the exclusive use of a forty-foot road; but a right to use it in common with others. He was to have an easement in the nature of an access or right of way over the road, by himself and his friends and servants, and nothing but an easement. If this were a grant of the road itself, any interference with the plaintiff's enjoyment of it would, no doubt, give a right of action. But all that is granted here is a right to a reasonable use of the road by the plaintiff in common with others, who have equal rights with him; and I am of opinion that no substantial interference with his exercise of that easement has been made out. The plaintiff's right has not been in- 372] fringed at all. I would wish to guard *myself from being understood to say that we should be justified in disregarding an interference with a right because the damage is inappreciable. Generally speaking, any interference with a *right*, however small, creates a cause of action.

DENMAN, J.: I am of the same opinion. No doubt the defendant was party or privy to whatever was done under the deed of the 17th of May, 1872. Indeed, that point was hardly pressed by Sir John Karslake. I agree, however, with the rest of the court that, upon the first point, the defendant is entitled to judgment. The main question is, what is the meaning of the covenant declared on. That was a grant to Colonel Clifford of the free right and liberty for himself, his friends, servants, and workmen, at all times at his and their will and pleasure, with or without horses, &c., to pass and repass over and along the roads or intended roads and ways delineated on the plan. Looking at the covenant and at the plan, I come to the conclusion that it

(1) 6 B. & C., 295.

was not intended to give to the plaintiff and to the other persons through him a right to go upon every square foot of the space so delineated, but only a right to the reasonable use of a way such as substantially existed over the spaces pointed out. It is only a grant of a reasonable user of a right of way. To hold otherwise would manifestly defeat the intention of the parties. Such being the nature and extent of the grant, what was done under the deed of the 17th of May, 1872, was not impeaching, affecting, or incumbering the plaintiff's right, and did not prevent the plaintiff from the full enjoyment of all that he stipulated for.

Judgment for the defendant.

Attorney for plaintiff: *G. C. Sherrard.*

Attorneys for defendant: *Bockett & Son.*

C A S E S
 DETERMINED BY THE
 COURT OF EXCHEQUER,
 AND BY THE
 COURT OF EXCHEQUER CHAMBER
 ON ERROR AND APPEAL FROM THE COURT OF EXCHEQUER,
 IN AND AFTER
 MICHAELMAS TERM, XXXVII VICTORIA.

[Law Reports, 9 Exchequer, 147.]

May 8, 1874.

147] *STOCK and Others v. HOLLAND.

*Bankruptcy Act, 1869, s. 87—Seizure and Sale—Payment to Sheriff to avoid Sale—
 "Proceeds of such Sale."*

The sheriff having seized the goods of a trader debtor under an execution for more than £50, the debtor, before sale, paid him on the 18th of November and the 21st of November, two sums of £100 and £32 respectively, on account of the debt. The judgment creditors knew of and assented to the payments. The debtor, on the 24th of November, filed a petition for liquidation, and a restraining order was served on the sheriff, who continued to hold the sums so paid on account. Subsequently, on the 20th of December, trustees were appointed, who claimed the £132:

Held, that the judgment creditors, having assented to the payments, were entitled to the money as against the trustees.

Ex parte Brooks (8 Eng. Rep., 876) followed.

THE plaintiffs signed judgment in this action for £201 16s. 1d. on the 13th of November, 1873. Execution was issued on the same day. The sheriff seized the defendant's goods on the 14th. On the 18th the defendant (who was a trader) paid £100 to the sheriff on account of the debt, and promised to pay the balance in a day or two. On the 20th of November the defendant saw one of the plaintiffs and told him of the payment, and begged that the execution might be withdrawn. The defendant also stated that his difficulties were only temporary, and that he would pay the balance due in two months. The plaintiffs agreed to grant his request on condition of his obtaining a surety to guarantee

payment. This the defendant promised to do, and it was arranged that he should go the next day to Derby with the plaintiffs' solicitor to see the proposed surety. Next day, however, he telegraphed to the solicitor to postpone the journey until the day following. On the same day, the 21st, he paid £32 more to the sheriff on account of the debt. On the 24th he filed a petition for liquidation in the Derbyshire County Court, and an order restraining the sale was served on the sheriff. No part of the goods seized had then been sold. The first meeting of creditors was held on the 20th of December, and two trustees were appointed, who, on the 22d, demanded the sum of £132, which still remained in the hands of the sheriff. The sheriff thereupon took out an inferpleader summons, upon the *hearing of which, before Bramwell, B., a special case was directed to be stated, under the Common Law Procedure Act, 1860, s. 15, for the opinion of the court. The affidavits used upon the hearing at Chambers, and which set forth the facts above stated, were ordered to constitute the special case. The question for the opinion of the court was whether the plaintiffs were entitled to the sum paid to the sheriff by the debtor on account of his debt as against the trustees under the liquidation.

The case was first argued in Hilary Term last, before Kelly, C.B., Cleasby and Amphlett, BB., when judgment was reserved until the decision of the Court of Appeal in Bankruptcy upon an appeal then depending from the decision of Bacon, C.J.B., in *Ex parte Brooke*. The Lord Chancellor and Lords Justices heard the appeal on the 30th of January and the 13th of February last, when the decision of the chief judge was reversed⁽¹⁾. The Court of Exchequer then directed this case to be reargued.

May 7, 8. *Arthur Charles*, for the plaintiffs: There is no question as to fraudulent preference in this case, and the only section of the Bankruptcy Act, 1869, under which the trustees can claim is the 87th⁽²⁾. But here the money paid cannot in any sense be considered as the proceeds of seizure and sale. There was no sale; and although, according to *Ex parte Rayner*⁽³⁾, seizure without sale gives the trustee a

⁽¹⁾ Law Rep., 9 Ch., 301.

⁽²⁾ The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 87, enacts that, "where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding £50, and sold, the sheriff shall retain the proceeds of such sale in his hands for a period of fourteen days, and

upon notice being served upon him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale after deducting expenses, on trust, to pay the same to the trustee."

⁽³⁾ Law Rep., 7 Ch., 325.

title to the goods seized, the section cannot give him a title to money paid to avoid a sale of the goods as well as to the goods themselves. There is evidence that the plaintiffs knew of the payment, and assented to the sheriff holding the money for them, at the same time promising the debtor to withdraw the execution upon certain conditions. The money, therefore, was money received to their use in the sheriff's hands: *Morland v. Pellatt*⁽¹⁾. Moreover, *Ex parte Brooke*⁽²⁾ [49] is decisive. There it *was held that money paid to the sheriff to avoid seizure after the creditors had assented to the sheriff holding it, belonged to them, and not to the trustee. Here there was a seizure, but the principle of the decision applies.

Francis Turner, contra: The circumstance that there had been a seizure distinguishes the present case from *Ex parte Brooke*⁽¹⁾. The title of the trustees to the goods themselves, although there has been no sale, cannot be disputed. A sale, therefore, is not indispensable to the operation of sect. 87. The goods seized had ceased to belong to the debtor, and the money which he paid to release them must be taken to have been received by the sheriff for him, and accordingly passed also to the trustees. There is no sufficient evidence to warrant the conclusion that the plaintiffs had absolutely assented to the payments in such a sense as to constitute the sheriff their agent. Indeed, according to James, L.J., in *Ex parte Pearson*⁽²⁾, the payment itself being made by the debtor to avoid a sale, is equivalent to a sale.

KELLY, C.B.: In this case the sheriff had seized the debtor's goods under an execution, and the debtor, in order to prevent a sale, paid the sheriff two sums, of £100 and £32, on account of the debt. The evidence is clear that these payments came to the knowledge of the creditors, and they delayed the sale of the goods seized in consequence. If no communication had been made to them, a question might have arisen as to whether payment to the sheriff was equivalent to payment to the creditors. But that question does not arise here; and it seems to me that the case of *Ex parte Brooke*⁽¹⁾ is in principle identical with the present case. We are bound by that authority, and I may add that it is one which commends itself to my mind as having been rightly decided.

It is argued that the payment is really equivalent to a sale. But that cannot be. The trustees have a good title to the goods seized, but they now want to have both money and

⁽¹⁾ 8 B. & C., 722

⁽²⁾ Law Rep., 9 Ch., 301.

⁽³⁾ Law Rep. 8 Ch., 667, at p. 672.

goods. Clearly they are not entitled to the money where the payment of it to the sheriff is assented to by the creditors.

The payment is not contended to have been by way of fraudulent preference. There was pressure, there was consideration for *the payment, namely, the delay in completing the execution, and the debtor was not contemplating bankruptcy. Unless, therefore, s. 87 of the Bankruptcy Act, 1869, is applicable, the plaintiffs are entitled to the money. But for the reasons I have given I do not think this money is in any sense "proceeds of the sale" within the meaning of that section.

CLEASBY, B.: I am of the same opinion. I think that *Ex parte Brooke* (¹), which is a binding, and to my mind, satisfactory authority, concludes this case. There money was paid before seizure to the sheriff to prevent the execution being levied, and the chief judge decided (²) that money so paid was in the sheriff's hands as the officer of the court. But, on appeal, it appeared that the execution creditor had assented to the mode in which the money had been paid, and thereupon the Court of Appeal reversed the chief judge's decision. It is said the case is distinguishable from the present one on two grounds. First, there was a seizure here. But I do not think this makes any difference. The money was paid here, as it was there, to prevent the execution from being completed and, as soon as it was assented to, became the money of the creditor. Secondly, it is contended that the plaintiffs never absolutely assented to the payment, and in one sense, no doubt, the assent was conditional upon the defendant doing something which he failed to do. But it was an absolute assent for the time, and amounted to an agreement on the plaintiffs' part that, in consideration of the part payment of the debt, and of the defendant's undertaking to get a surety and pay the balance in two months, they would stay the execution. Upon the authority, therefore, of *Ex parte Brooke* (¹), I think the plaintiffs are entitled to judgment.

AMPHLETT, B., concurred.

Pigott, who appeared for the sheriff, applied that the costs of the sheriff incurred at Chambers and on the argument might be paid by the trustees. The court refused the application.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Vizard, Crowder & Anstie.*

Attorney for trustees: *Dubois.*

(¹) Law Rep., 9 Ch., 301.

(²) Law Rep., 9 Ch., 302, n. (1).

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Treloar v. Bigge.

[Law Reports, 9 Exchequer, 151.]

April 24, 1874.

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*TRELOAR V. BIGGE.

Landlord and Tenant—Covenant not to assign—Arbitrary Refusal—Qualified Covenant.

A lessee covenanted with the lessor not to assign the demised premises without the consent in writing of the lessor, "such consent not being arbitrarily withheld;" and it was provided by the lease that if the lessee should assign the premises without the consent in writing of the lessor, "but such consent is not to be arbitrarily withheld," the lessor might re-enter:

Held, that there was no covenant by the lessor, either express or implied, not to refuse his consent arbitrarily, but that an arbitrary refusal would leave the lessee at liberty to assign without the lessor's consent.

Seemle, by Kelly, C.B., and Pollock, B. An "arbitrary" refusal is equivalent to an "unfair and unreasonable" refusal; and a refusal "upon advice," though the grounds of refusal be not specified, is not "arbitrary."

DECLARATION that the defendant, by deed, demised to the plaintiff premises at 67, Ludgate Hill, for twenty-one years, from the 25th December, 1864, subject to a covenant that the plaintiff would not assign or underlet the premises, or any part thereof, without the consent in writing of the defendant, and that the defendant covenanted with the plaintiff that he would give such consent when the same should be reasonably required, and would not arbitrarily withhold the same; that the plaintiff was desirous of letting part of the premises, and applied for the defendant's consent, and all conditions, &c., were fulfilled, yet the defendant refused his consent and arbitrarily withheld the same.

The defendant pleaded, denying the covenant and the breach.

Issue.

The cause was tried at the sittings in Middlesex after Michaelmas Term, 1873, before Kelly, C.B., when the following facts were proved:

The plaintiff was tenant to the defendant of premises at No. 67, Ludgate Hill, London, upon the terms of a lease, dated the 18th of January, 1865, for twenty-one years from the previous Christmas. The lease contained the following covenant:

"And the said Thomas Treloar [the plaintiff] doth covenant with the said T. E. Bigge [the defendant] that he shall not nor will assign this present lease, or let, &c., or other-
152] wise part with *the premises hereby demised, or any part thereof, without the consent in writing of the said T. E. Bigge, such consent not being arbitrarily withheld."

The proviso for re-entry, which immediately followed the covenant, was in these terms: "Provided, always, that if the said T. Treloar shall at any time assign, let, &c., the said premises, or any part thereof, without the consent in writing of the said T. E. Bigge first had and obtained, but such consent is not to be arbitrarily withheld, then it shall be lawful for T. E. Bigge to re-enter."

In March, 1870, the plaintiff applied to the defendant for leave to underlet a part of the premises to the National Provincial Plate Glass Company for one year. The defendant had meanwhile become aware that the Commissioners of Sewers for London would require the premises, although no formal notice to treat had then been served; and on the 26th of March he replied, "upon advice," that "he could not agree to the plaintiff's proposition, under the altered circumstances of the probable tenure" of his property. The plaintiff's solicitors renewed the application, and requested the defendant to reconsider the matter. He replied, adhering to his former resolution. The underletting, he said, would be no profit to him, and, if the city authorities took the property, merely an advantage to the plaintiff. The premises were afterwards taken by the Commissioners of Sewers, under 57 Geo. 3, c. xxix. The plaintiff now claimed £150 as damages, which he alleged he had sustained through the defendant's "arbitrary" refusal to consent to the proposed underletting. The learned judge asked the jury whether the refusal by the defendant was arbitrary, and on this point they found for the plaintiff. But being of opinion that the words in the lease did not constitute a covenant on the defendant's part, and that if they did, there was no evidence to justify the finding of the jury, the learned judge directed a nonsuit to be entered, with leave to move to enter a verdict for the plaintiff for £150. In Hilary Term last a rule was obtained accordingly, upon the ground that the lease contained either expressly or by implication the covenant declared upon, and that there was evidence to go to the jury that the consent of the plaintiff had been arbitrarily refused.

*April 23. *J. Brown*, Q.C., and *Lumley Smith* [153 showed cause: First, there is no covenant on the defendant's part such as is declared on. In *Wolveridge v. Steward* (1), the principle governing this case is laid down thus: "It is fully established that no precise form of words is necessary to constitute a covenant. 'Any words which show an agreement to do a thing make a covenant;' but it must be clear

(1) 1 C. & M., 644, at p. 657.

that they are meant to operate as an agreement, and not merely as words of condition or qualification." It is impossible to say that the words in the covenant by the plaintiff not to assign, taken alone, are more than words of qualification. Their effect is to leave the tenant at liberty to assign without the landlord's consent, if such consent be arbitrarily withheld. But it will be contended that the proviso for re-entry contains an express covenant by the defendant. It is, however, merely a repetition of the qualification, and limits the right of entry to the case of the tenant having assigned without the defendant's consent in writing, such consent not having been arbitrarily withheld. Secondly, there has been no arbitrary refusal here. The defendant refused after consideration and "upon advice." He was not bound to declare his reasons for refusing: *In re Gresham Life Assurance Society* (*).

Day, Q.C., and *Petheram*, in support of the rule: The words of the covenant constitute a covenant in express terms by the defendant not arbitrarily to withhold his assent. And if this be doubtful as to the covenant, the proviso is unambiguous. There the words are contained in a separate clause, "but such consent is not to be arbitrarily withheld." This is more than a qualification upon the defendant's right of re-entry. It is within the principle which has been referred to, and amounts to a distinct agreement not to withhold consent arbitrarily. If this be so, there was evidence to support the finding of the jury. The defendant refused "upon advice," but he gave no reason whatever, and the circumstances of the case disclose none. *In re Gresham Life Assurance Society* (*) is not applicable. There the directors had power to refuse transfers of shares unless the transferee was "approved of," and they acted as arbitrators [54] in the matter. But here the jury were *justified in supposing that the defendant was acting from mere caprice. In *Marshall v. Bishop of Exeter* (*), an allegation in a plea to a declaration in *quare impedit* that the defendant (the bishop) had "good reason" to believe that the presentee had been guilty of an ecclesiastical offence was held insufficient. So here the defendant ought to have given his grounds for refusing his assent. In *Sheppard v. Hong Kong and Shanghai Banking Corporation* (*), a very similar clause was conceded to be a covenant by the lessor, and it was there held that strong grounds for refusing assent must be established.

(*) Law Rep., 8 Ch., 446, per Mellish, L.J., at p. 451.

(*) Law Rep., 8 Ch., 446.

(*) Law Rep., 3 H. L., 17.

(*) 20 W. R., 459.

Again, the word "arbitrary" must be interpreted with reference to the proposed assignee, to whom there could be no possible objection in this case.

Cur. adv. vult.

April 24. KELLY, C.B.: Two questions arise in this case, the first being whether certain words introduced in the clause prohibiting assignment, and whereby the plaintiff covenants not to assign without license in writing, amount to an absolute covenant on the part of the lessor not to withhold his consent arbitrarily. I am of opinion that they do not constitute a covenant on which the lessee can sue, but are words, the only effect of which is to qualify the generality of the phrase into which they are introduced. The plaintiff covenants that he will not assign the lease or the premises demised "without the consent in writing of the said T. E. Bigge" (the defendant) "first had and obtained," and if the words stopped there the tenant's covenant would be absolute, but they are qualified by the words "such consent not being arbitrarily withheld." Now the rule of law, no doubt, is that any words in a deed which impose an obligation upon another amount to a covenant by him; but the words must be so used as to show an intention that there should be an agreement between covenantor and covenantee to do or not to do a particular thing. I cannot find any such intention here. The words, taken grammatically, do not seem to me to amount to an undertaking by the lessor, but are a part of the same sentence as that containing the lessee's covenant, and qualify its generality. They prevent that covenant *operating in any case of arbitrary refusal on the part [155 of the lessor, that is, in any case where, without fair, solid, and substantial cause, and without reason given, the lessor refuses his assent. I have known in my own experience several cases in which actions have been brought for the arbitrary withholding of consent by a landlord. But in all (as in the case of *Sheppard v. Hong Kong and Shanghai Banking Corporation* (1)) there was a covenant in express terms, so as to give the lessee a right of action. In the present case, for the reasons I have given, I think there was no such covenant.

Then it is contended that a covenant is contained in the proviso, and it is quite possible that if the words there used, and on which reliance is placed, had been used in another part of the deed, they might have been properly construed as amounting to a covenant. But the two clauses which

(1) 20 W. R., 459.

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follow each other must be taken together. The language is somewhat varied in the proviso, but substantially is to the same effect as that used in the covenant. It shows the description of refusal which is to give the right of re-entry. The qualified covenant not to assign is followed by the qualified covenant for re-entry.

The conclusion I have arrived at upon the construction of the deed renders it unnecessary to decide the question of arbitrary refusal. But I think it right, nevertheless, to express my opinion upon it, and in my judgment there was no evidence of any arbitrary refusal. The lessor took advice upon the subject, and acting upon that advice, refused his assent. It is impossible to say, when the circumstances of the case are considered—the nature of the property and the duration of the lease—that the defendant's act was arbitrary. It has been said that the refusal must be taken to be arbitrary if the character of the proposed assignee is such as cannot be objected to on any reasonable grounds. But I cannot assent to that view. The covenant is not qualified in that manner, as it might have been, and I think the defendant was entitled to refuse his assent upon any fair and reasonable ground. Now, here was an act which enabled a public body to take possession of the premises, and the defendant knew they intended to take them. It might be an advantageous thing to be able to give the corporation [56] *early possession. It is an every-day matter in compensation cases for an extra sum to be paid for such possession, and the defendant might well desire not to assent to the coming in of an assignee, who would not, of course, be as willing as the assignor to give up the premises. He would be buying them for occupation, while the old tenant, by the very act of wishing to assign, had shown that he did not care to occupy any longer. It cannot be said that under such circumstances the refusal was arbitrary; that is, unfair and unreasonable. It might certainly be to the advantage of the defendant, and indirectly it would benefit the plaintiff too, who would, by reason of the non-assignment, receive compensation for his interest in the term. Upon both grounds, therefore, I think the rule should be discharged. My Brother Pollock concurs in this judgment.

AMPHLETT, B.: The first question in this case is whether the lessee has any right of action on the covenant declared upon, and I am of opinion that he has not. It may be that the words themselves might, if it were necessary to carry out the intention of the parties, be sufficient to raise a covenant by implication in the lessor. But no such obligation ought

to be implied if the true intention of the parties can be carried out by adopting a literal and natural construction. Now, looking at the place in which the words relied on occur, I think they ought to be construed as a qualification on the covenant of the lessee. That covenant is in derogation of his common law rights, and it is more convenient and reasonable to hold that the words were introduced to limit the generality of the covenant than to hold them to impose an obligation on the lessor. The true interpretation of the words, I think, is to release the plaintiff from his covenant not to assign without the plaintiff's assent, if that assent is arbitrarily withheld. If that be so they cannot be construed as creating a cross liability. They either qualify the tenant's covenant, or they create a covenant, on the landlord's part. They cannot do both. If they create a covenant the result would be that, even although there was an arbitrary refusal, the lessee would be unable to assign without incurring a forfeiture. If he did assign he would be liable to eviction, and yet would have an action accrued to him *against his landlord in respect of the arbitrary [157] refusal. Such a construction would be highly inconvenient, and there is nothing in the words which renders it necessary so to construe them. The other construction is the more convenient. The lessee may assign, if the lessor arbitrarily refuses his assent, without any assent, and the arbitrary refusal would be an answer to any proceedings which might be taken against him. The lessor, on the other hand, would escape a continual liability to a cross action. Upon the second question I feel some doubt. It has been fully discussed by my lord; but as it is unnecessary to our decision, I do not desire to express any opinion upon it.

Rule discharged.

Attorneys for plaintiff: *Hyde & Tandy.*

Attorney for defendant: *Dobie.*

[Law Reports, 9 Common Pleas, 157.]

April 17, 1874.

WILLIAMS V. THE GREAT WESTERN RAILWAY COMPANY.

Duty to fence—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 47, 61—26 & 27 Vict. c. 92, s. 6—Public Footpath crossed on the Level—Evidence of Negligence.

The defendants' line crossed a public footpath on the level; but the defendants had not erected any gate or stile, as provided by 8 & 9 Vict. c. 20, s. 61.

The plaintiff, a child of four years and-a-half old, having been sent on an errand,

was shortly afterwards found lying on the level crossing, a foot having been cut off by a passing train:

Held, that there was evidence to go to the jury that the accident was caused by the neglect of the defendants to fence.

ACTION brought to recover damages for personal injuries suffered by the plaintiff through the defendants' negligence.

The cause was tried before Keating, J., at the Denbighshire Summer Assizes, 1873, and the following facts appeared: At the place where the accident occurred the defendants' line ran for some distance on the level across a piece of open ground, and for a space of about 150 yards was wholly unfenced. At a point in this unfenced part it was crossed by a public carriage road on the level, and at another point, [58] about thirty yards off, by a public footpath, *also on the level, which struck off from the road some little distance before it reached the line.

On the 22d of December, 1871, the plaintiff, a child of four and-a-half years old, was found lying on the rails by the footpath, with one foot severed from his body. There was no evidence to show how the child had come there, beyond this, that he had been sent on an errand a few minutes before from the cottage where he lived, which lay by the roadside, at about 300 yards distance from the railway, and farther from it than the point where the footpath diverged from the road. It was suggested on the part of the defendants that he had gone along the road, and then, reaching the railway, had strayed down the line; and on the part of the plaintiff, that he had gone along the open footpath, and was crossing the line when he was knocked down and injured by the passing train. The learned judge thought there was no evidence to go to the jury of liability on the defendants, and nonsuited the plaintiff, reserving leave to him to move to enter a verdict for £250, the amount at which the jury had, by consent, assessed the damages, if there was any evidence for the jury in support of the declaration (*).

A rule having been obtained accordingly,

McIntyre, Q.C., and *Horatio Lloyd*, contended that there was no act of negligence on the part of the defendants to which the accident could be attributed; that they were not bound to maintain a watchman at the footpath: *Stubbley v. London and North Western Ry. Co.*(¹); that if there had been a watchman at the road, it could not be assumed that

(¹) The declaration contained four counts—1. Alleging negligence in the defendants in not placing gates at a public carriage-way crossed by the railway, nor watching it; 2. In not taking reasonable care for the protection of persons

using a public highway crossed by the railway; 3. In not fencing the railway from the adjoining land; 4. In negligently managing the railway, and the trains running thereon.

(²) Law Rep., 1 Ex., 13.

he would have seen what was going on upon the footpath ; that a want of the usual warning, or an intimation of safety at the public road, might affect those coming by the high road, *Stapley v. London, Brighton and South Coast Ry. Co.* (1), but not those coming by the footpath ; that if *the child got on the line by the high road, and then [159 strayed down the line to where he was injured, he was simply a trespasser, and not in any sense lawfully on the line ; that if there had been a gate or stile at the footpath, and the child went that way, there was no reason to say that he would have been stopped or turned back ; and that the case was simply, like that of *Singleton v. Eastern Counties Ry. Co.* (2), an unexplained accident.

Morgan Lloyd, Q.C., and *English Harrison*, for the plaintiff, contended that in *Singleton v. Eastern Counties Ry. Co.* (3) the plaintiff was wrongfully upon the railway, and no negligence was shown in the defendants ; that here the plaintiff was rightfully on the railway, and there was ample evidence of negligence, none of the precautions prescribed by 8 & 9 Vict. c. 20, ss. 47, 61, and 26 & 27 Vict. c. 92, s. 6, having been observed (4) ; that the only question was whether that negligence could be reasonably connected with the accident ; that in determining this, all the circumstances must be taken into account ; that in a way open to the public the safety of the whole public is to be considered, and that of the weakest and least capable most ; that although 8 & 9 Vict. c. 20, s. 47, mentions cattle, the precautions enacted by it were not directed to the safety of animals, either exclusively or chiefly, but to the safety of human beings, and especially of the infirm and the young ; that s. 61 does not even mention cattle ; that if such a warning and protection as is afforded by a gate or stile had existed on the footpath, the child would very probably have been stopped altogether, or would at least have been checked long enough to see his danger ; and that there were therefore circumstances which could not be withdrawn from the jury, and

(1) Law Rep., 1 Ex., 21.

(2) 7 C. B. (N.S.), 287.

(3) By 8 & 9 Vict. c. 20, s. 47, when a railway crosses a public carriage road on the level, the company are to erect and maintain gates across the road, and to employ persons to open and shut the gates, which are, when closed, to fence in the railway and prevent cattle or horses from entering the railway ; and by s. 61, when a railway crosses a public highway

other than a public carriage-way on the level, the company are, if the way is a bridle way, to erect and maintain gates, and if a footway, gates or stiles.

By 26 & 27 Vict. c. 92, s. 6, when a railway crosses a public carriage road on the level, the company are to erect and maintain a lodge, and keep a proper person to watch or superintend the level crossing.

on which they would have been entitled to find for the plaintiff.

[160] *KELLY, C.B.: My mind has fluctuated, but I have finally come to the conclusion that the true question is as Mr. Harrison put it, not so much whether there was negligence on the part of the company (as to which there is no doubt), but whether that negligence was so connected with the accident to the plaintiff as to entitle a jury to be consulted as to whether the action is maintainable.

The facts are, that a child, of tender years but of sufficient age to be able to cross the line by itself, was found on the footpath at the level crossing with its foot severed from its body, and the questions are, first, whether there was any negligence on the part of the defendants which could have contributed to the accident; secondly, whether such negligence was the cause of the accident.

As to the first point, it is impossible to imagine a case where negligence is more clearly made out, or more inexcusable. A carriage-way of considerable width passed over the line on a level, and about thirty yards distant from this a footway crossed the line, also on a level. There was a clear statutory duty to have gates on both sides of the carriage-way, which ought to be kept closed except when animals or vehicles are crossing the line; and as to the footpath, it was equally required for the protection of the public that a gate or stile should be placed at each side of the railway. Both these duties were left unperformed. This was clearly negligence. I say nothing more as to the carriage-way, because there is no evidence by which it is possible to connect the negligence of the company in this respect with the accident. But the law also required a gate or stile to the footpath for the protection of the public, and perhaps peculiarly for the protection of human beings less able than ordinary persons to take care of themselves, as infants or infirm persons; but nothing of the kind was done. Now, it is very possible that the existence of a gate or stile upon the footpath might have prevented the child from going on, or might have detained him long enough to prevent this accident from happening. It is true these are only possibilities; but being such, and negligence being established in the defendants, the question is whether, considering the short time which had [161] elapsed since the child left home, and all the other *circumstances of the case, a jury may not have been very well satisfied that one or other of those possibilities would have happened, and that if a stile or gate had been there this accident would not have occurred.

I do not say that it is not a case of difficulty, but it is one which might well have been submitted to the jury, and under these circumstances the rule must be made absolute to enter the verdict for the plaintiff for the sum assessed by the jury.

POLLOCK, B.: The question in this case is whether there was any evidence that ought to have been left to the jury. I should be sorry to think that we were extending the rule on the subject of negligence which was laid down by Willes, J., in the case of *Daniel v. Metropolitan Ry. Co.* (¹), in terms which were approved of in the Exchequer Chamber and the House of Lords (²), although the decision was itself reversed. "It is not enough for the plaintiff to show that there has been an accident upon the defendants' line, and thence to argue that the company are liable even *prima facie*. It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to; and I go further and say that the plaintiff should also show with reasonable certainty what particular precautions should have been taken."

Can we, consistently with the rule so laid down, hold that there was evidence which might have been submitted to the jury? Now as to there being a non-performance of what was enjoined by the act of Parliament, there is no doubt about it; and it is not for us to speculate on what was the precise intention of the legislature when they required that there should be a gate or stile on a footpath crossing on a level. It is sufficient to say that the defendants have neglected to comply with the enactment.

Then can it be inferred with reasonable probability that the accident occurred by reason of this negligence, so as to make this a question for the jury? I was at first impressed with the view *that this was like the case in which it [162 has been held that where there is an even balance of the evidence, so that no inference can be properly drawn one way more than the other, the judge must not leave the question to the jury. The real question is (as Mr. Harrison put it), whether the negligence can reasonably be so connected with the accident as to allow of a jury saying that it did in fact give occasion to it. Upon the whole, I think that there was evidence which might be left to the jury, and the rule must therefore be made absolute.

(¹) Law Rep., 3 C. P., 216, at p. 222. (²) Law Rep., 3 C. P., 591; *Ibid.*, 5 H. L., 45.

AMPHLETT, B.: My opinion has fluctuated during the argument, but I have come to a conclusion satisfactory to my own mind that the verdict should be entered for the plaintiff. We start with the fact that the defendants have failed to comply with the express provisions of the statute, and this is an act of gross negligence. I think nothing turns on the neglect at the carriage-way. But the child was in fact found upon the footway, and the proper presumption is that it met with the accident on the footway, and whilst it was crossing the line. Then the child being lawfully on the footway, and the defendants being guilty of a breach of duty, the only question is whether there is reasonable ground for connecting this breach of duty with the accident.

It is not necessary to decide this as a jury; it is enough to say that I think it was clearly a case which ought to be submitted to a jury. There are many supposable circumstances under which the accident may have happened, and which would connect the accident with the neglect. If the child was merely wandering about, and he had met with a stile, he would probably have been turned back; and one at least of the objects for which a gate or stile is required is to warn people of what is before them, and to make them pause before reaching a dangerous place like a railroad. The rule must be made absolute.

Rule absolute.

Attorneys for plaintiff: *Kennedy & Hughes, for Jones, Wrexham.*

Attorneys for defendants: *Young, Maples & Co.*

There is considerable conflict in the cases in this country upon the questions. 1. As to whether the same degree of care is to be exacted from a child of tender years, as from an adult. 2. Whether the negligence of a parent or other person, having the care or charge of a child of tender years, will prevent a recovery for injuries to such child by another. 3. As to how much evidence as to the circumstances attending an injury shall be required.

1. Upon the first question the balance of authority seems to be that the same degree of care is not to be required from a child of tender years as from an adult: *Mangum v. Brooklyn Rail Road*, 38 N. Y., 458, 461; *Idl v. Forty-Second St. R. R. Co.*, 47 N. Y., 317; *North Penn. R. R. Co. v. Mahoney*, 57 Penn. St. R., 218, S. C. below 6 Phil. Rep., 242; *Ranch v. Lloyd*, 31 Penn. St. Rep., 358, 370; *Sheridan v. The Brooklyn, etc.*,

36 N. Y., 42; *Stout v. R. R. Co.*, 11 Am. Law Reg., N. S., 226; *Carter v. Towne*, 98 Mass., 568; *O'Flaherty v. Union Railway Co.*, 45 Missouri, 70, 3 Am. Law Times, State Courts Rep., 42; *Kay v. Penn. R. R. Co.*, 3 Am. Law Times, 72; *Warner v. R. R. Co.*, 6 Phil. Rep., 537; *Costello v. Syracuse, etc.*, 65 Barb., 92; *Haycraft v. Lake Shore, etc.*, 5 New York Supreme Court Rep., 49, 2 Hun, 489; *Kay v. Penn. R. R. Co.*, 65 Penn. St. Rep., 269, 3 Am. Rep., 628; *Kerr v. Fergue*, 54 Ills., 482, 5 Am. Rep., 146; *Karr v. Parks*, 40 Cal., 188; *Com. v. Metropolitan, etc.*, 107 Mass., 236; *R. R. Co. v. Gladmore*, 15 Wallace, 401; *Rail Road Co. v. Stout*, 17 Wallace, 657; *East Saginaw, etc., v. Bohn*, 27 Mich., 503; *McMahon v. North, etc.*, 39 Md., 438; *Elkens v. Boston, etc.*, 115 Mass., 190; *Crissy v. Hestonville, etc.*, 75 Penn. St. R., 83; *Philadelphia, etc., v. Hassard*, 75 Penn. St. R., 367.

Although negligence by a child may be so gross as to preclude a recovery: *McMahon v. North, etc.*, 39 Maryland, 438; *Pittsburgh, etc.*, v. *Caldwell*, 74 Penn. St. Rep., 421.

The case of *Squire v. Central, etc.*, 86 N. Y. Superior Court Rep., 437, upon this question, seem to be in harmony with the mass of authorities. What would not be negligence toward an adult, may be gross negligence as respects a child: *Schierhold v. R. R. Co.*, 40 Cal., 447; *Meyer v. Midland, etc.*, 2 Neb., 319; *Pittsburgh, etc.*, v. *Caldwell*, 74 Penn. St. R., 421.

2. The negligence of a parent or other person having the care or charge of a child of tender years, will not prevent a recovery for injuries to such child by another. It is not *per se* negligence attributable to the child: *Bellefontaine, etc.*, v. *Snyder*, 18 Ohio St., R., 399; *Mangum v. Brooklyn R. R.*, 36 Barb., 239, 242, 38 N. Y., 455; *Drew v. Sixth Ave. R. R.*, 26 N. Y. R., 49; *Cosgrove v. Ogden*, 49 N. Y., 255; *Downs v. N. Y. Cent. R. R.*, 47 N. Y., 83; *Ihl v. Forty-Second St., etc.*, 47 N. Y., 317; *Mulligan v. Curtis*, 100 Mass., 512; *Slont v. R. R. Co.*, 11 Am. Law Reg., N. S., 226; *Mahoney v. R. R. Co.*, 6 Phil. Rep., 242, affirmed 57 Penn. St. Rep., 218; *Pendril v. Second Ave. R. R. Co.*, 43 How. Prac., 399, S. C., 34 N. Y. Superior Ct. Rep., 481; *Kay v. Penn. R. R. Co.*, 65 Penn. St. Rep., 269, 3 Am. Rep., 628. See also note to *Kerr v. Fergue*, 5 Am. Rep., 148; *Karr v. Parks*, 40 Cal., 188; *Schierhold v. R. R. Co.*, 40 Cal., 447; *Com. v. Metropolitan, etc.*, 107 Mass. 236; *Pittsburgh, etc.*, v. *Pearson*, 72 Penn. St. Rep., 169; *East Saginaw, etc.*, v. *Bohn*, 27 Mich., 503.

Although it may be so gross as to bar a recovery: 4 American Law Review, 405; *Hartfield v. Roper*, 21 Wend., 615; *Honesberger v. Second Ave. R. R.*, 2 Abb. Ct. Appeals Dec., 378, and cases cited *pro* and *con*, 1 Keyes, 571; *Flynn v. Hatton*, 4 Daly, 552, 43 How. Prac., 333, 84 N. Y. Superior Ct. Rep., 481, S. C. 43 How. Prac., 399; *McLain v. Van Zandt*, 48 How. Prac., 80; *Jeffersonville, etc.*, v. *Bowen*, 40 Indiana, 545; *Pittsburgh, etc.*, v. *Pearson*, 72 Penn. St. Rep., 169; *Campbell's Law of Neg.*, English ed., 69. *Leslie v. Lewiston*, 62 Maine, 468; *Philadelphia, etc.*, v. *Long*, 75 Penn. St. R., 257; *Louisville v. Murphy*, 9 Bush (Ky.), 523.

The case of *Bulger v. Albany Railway Co.*, 42 N. Y., 459, went upon the ground that the defendant's driver was guilty of no negligence.

3. That the amount of evidence required as to the circumstances attending an injury, varies with each case: *Johnson v. Hudson River R. R.*, 20 N. Y. Rep., 70-7, 74, S. C. below 6 Duer, 647; *Davenport v. Ruckman*, 10 Bosw., 20, 33, affirmed 37 N. Y., 568; *Squire v. Central, etc.*, 86 N. Y. Superior Court Rep., 437; *Schierhold v. R. R. Co.*, 40 Cal., 447; *Com. v. Metropolitan, etc.*, 107 Mass., 236; *Rail Road Company v. Stout*, 17 Wallace, 657; *Pittsburgh, etc.*, v. *Pearson*, 72 Penn. St. Rep., 169; *McMahon v. North, etc.*, 39 Maryland, 438.

Although the proof of negligence, where the transaction is not seen by any one, may be so slight as to require the court to nonsuit: *Squire v. Central, etc.*, 36 N. Y. Superior Court Rep., 436. See *Com. v. Metropolitan, etc.*, 107 Mass., 236.

[Law Reports, 9 Exchequer, 163.]

May 4, 1874.

*THORN V. THE MAYOR AND COMMONALTY OF THE [163 CITY OF LONDON.

Engineering Contract—Plans and Specification—Mode of Construction—Impossibility of Execution in Mode specified—Implied Warranty.

The defendants being about to erect a bridge, an engineer prepared for them, at their request, certain plans and specification both of the bridge and of the mode in which it was to be constructed. The plaintiff, on the faith of these plans and specification, and without any independent inquiry whether the work could be done as specified, entered into a contract with the defendants to do it in accordance with the

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terms of the plans and specification. After the plaintiff had incurred great expense, it was found that the work could not be executed in the manner specified. The plaintiff sued the defendants on the ground of an implied warranty by them that the work could be executed in the manner described in the plans and specification :

Held, that no such warranty could be implied.

SPECIAL CASE stated for the opinion of the court.

The declaration alleged that the defendants guaranteed and warranted to the plaintiff that Blackfriars Bridge could be built according to certain plans and a specification then shown by the defendants to the plaintiff, without tidework, and in a manner comparatively inexpensive, and that certain caissons shown on the said plans would resist the pressure of water during the construction of the said bridge, whereby the plaintiff was induced to contract with the defendants for the construction of the said bridge for a certain sum of money far less than he otherwise would have done; and the plaintiff, relying on the said warranty, commenced the said bridge; whereas the said bridge could not be built according to the said plans and specification and without tidework, and the said caissons would not stand, whereby the plaintiff was compelled to expend divers large sums of money in endeavoring to build the said bridge and lost all the profits he otherwise would have realized in building the same.

The facts of the case were as follows: By the Blackfriars Bridge Act, 1863, the defendants were authorized, among other things, to pull down and remove the then existing Blackfriars Bridge and the works connected therewith, and to construct a new bridge and certain other works, as therein mentioned, across the river Thames; and they were further [64] authorized to appoint a committee to carry the *act into execution; and it was enacted that such committee should have such or so many of the powers and authorities and discretion by that act given to and reposed in the corporation as the corporation should think fit or proper to delegate to such committee. Shortly after the passing of the act the corporation duly appointed a committee, and delegated to them all the powers of the corporation under the act. The committee employed Mr. Joseph Cubitt as their engineer, and a specification and plans and drawings of the proposed works were prepared by him (').

The following are such portions of the specification as are material :

By clause 1 of the specification the contract was to include the whole work to be executed, as shown in the various plans or described in the specification, as well as all con-

(') Both parties were at liberty on the argument to refer to any of these documents.

tingent works which, in the opinion of the engineer, were thereby implied, or were requisite for the due completion of the work shown and described as to be executed under the contract.

By clause 11 the engineer was to be at liberty to vary the dimensions or position of the various parts of the works to be executed under the contract, without the contractor being entitled to any extra charge for such alteration, provided the total quantity of work should not thereby be increased or diminished; but if any greater or less quantity of work should be required, the contractor was to be bound to execute the same, and the addition or deduction, as the case might be, would be valued according to the schedule of prices to be delivered in the lump sum tender; and in case of any works not provided for in that schedule, then to be valued according to the schedule of the Government Board of Works in force at the time.

By clause 12 the contractor was bound, under penalty, to complete the whole of the work included in the contract within three years from the date when the work commenced.

By clause 26 and following clauses allowance was made for extras, but the question of payment was to be referred to the engineer, whose decision should be final and binding.

By clause 30 the contractors were to take out their own quantities.

*Clause 36 referred to plans and sections of the then [165 existing bridge and the works executed thereon, and continued thus: "They give all the information possessed respecting the foundations. These plans are believed to be correct, but their accuracy is not guaranteed, and the contractor would not be entitled to charge any extra should the work to be removed prove more than is indicated on these drawings."

By clause 54 the contractor was to satisfy himself as to the nature of the ground through which the foundations were to be carried; it was stated that all the information given on this subject was believed to be correct, but was not guaranteed.

By clause 63 the foundations of the piers were to be put in by means of wrought-iron caissons, as shown in the drawing.

By the 64th and following clauses and the drawings referred to, the quantity of iron to be used in the caissons, the form and dimension of the ironwork, and the mode of making them watertight by means of india-rubber, were detailed, and directions were given for lowering the caissons and get-

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ting them closed. By clause 77 all risk and responsibility involved in the sinking of these caissons was to rest with the contractor.

On the 5th of March, 1864, the committee issued an advertisement inviting tenders for the execution of the works comprised in the above-mentioned specification and plans, in which it was stated that the plans and specification might be seen, and further particulars obtained, upon application at the office of the engineer.

In consequence of this advertisement, the plaintiff and his brother and partner, Peter Thorn (since deceased) on the 22d of April, 1864, sent in a tender to the corporation. Their tender was accepted, and a contract was afterwards, on the 24th of May, 1864, executed under seal by the contractors of the one part and the corporation of the other part, which, so far as is material, was as follows:

By this deed it was agreed that the contractors should execute, in a substantial manner, under the superintendence and according to the directions and to the satisfaction of the engineer, all the works of every description which should be required to be made, done, and executed in and about or connected with the pulling down and removing the existing Blackfriars Bridge, with its piers, abutments, stairs, and approach[166] proaches, and the building and constructing the *proposed new bridge across the River Thames at Blackfriars, including all piers, stairs, and approaches and carriage-way and footways over the same bridge, and adjoining thereto on each side up to the contract line according to the specifications prepared by the engineer and the drawings referred to in the said specification, and generally the whole of the works shown on the said drawings or described or mentioned in the said specification, and also all contingent works which in the opinion of the engineer were implied thereby or requisite for the due completion of the works aforesaid, and should execute the works thereinbefore mentioned under and subject to the directions, rules, regulations, explanations and instructions mentioned or referred to in the specification, and that with such alterations (if any) as might from time to time, in manner thereafter mentioned, be directed by the engineer.

That the contractors should make good any settlement, &c., which might happen to the new bridge or any of the works until the expiration of three calendar months from the date of the final certificate to be given by the engineer.

That the works should be commenced immediately after an order for that purpose, signed by the engineer, should

have been given to the contractors, and after possession should have been given to the contractors of the ground on which the works were to be executed, and that they should be completed within three years from that time, unless hindered or delayed as thereafter mentioned.

That the contractors would execute all the works for £269,045, to be paid in manner thereafter mentioned, increased or diminished by such sums as should become payable, or should have to be deducted, as thereafter provided, in respect of alterations or variations in the works.

That it should be lawful for the engineer of the committee at any time or times during the progress of the works, to vary the dimensions or position of various parts of the works to be executed without the contractors being entitled to any extra charge for such alterations, provided the total quantity of work should not be increased or diminished thereby. But in case any greater or less quantity of work should be required by the engineer, the addition or diminution should be valued as therein mentioned.

That the contractors would execute and complete the works *according to every alteration and variation [167 notified in writing by the engineer, and in the manner and within the time in and within which such works ought to be completed according to the true intent of the deed, or, in case the said works or any of them should be increased, then within such further or extended time (if any) as the engineer should certify by writing under his hand to be proper, and no such alteration or variation should vacate or lessen the validity of any of the covenants or agreements contained in the deed on the part of the contractors to be observed or performed, but such sum of money should be added to or deducted from the said sum of £269,045 as should be estimated to be a fair proportionate addition or deduction to be allowed for such alterations or variations, as before mentioned.

That the contractors would guarantee the stability of all the works, notwithstanding the same might have been done with the approbation of the engineer, and would forthwith and without delay make good all damage which might happen to the works during their progress, and would make satisfaction for all damages sustained by third persons arising out of the execution of the works, and indemnify the defendants against claims in respect of such damage.

That in case they should, without the happening of any of such causes or excuses for delay as therein mentioned, fail to complete the works within three years, computed from the

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date of the order to proceed, they should be allowed further time for the purpose of completing the same upon the terms of the aforesaid sum of £269,045, being reduced by a reduction after the rate of £1,000 per calendar month for each and every month during which, or any fraction of which, the works should remain uncompleted after the expiration of the three years, such reduction being considered and accepted as an equivalent for the accommodation of the longer period thus allowed for the completion of the works, subject to a proviso that no deduction should be made, nor should any damages be payable for or in respect of such time as the engineer should by writing under his hand certify that the works had been delayed or suspended by reason or in consequence of bad weather, or inevitable accident, or other circumstances not avoidable by the exercise of reasonable care, skill, or diligence on the part of the contractors, [68] *or by or in consequence of any order of the engineer, or in consequence of any strike occurring amongst workmen after the commencement of the works.

The corporation did not nor did the committee at any time interfere in any way directly or indirectly with the engineer in his dealings with the contractors, or with their mode of conducting the works, or with any alterations in or additions to the plans and drawings.

The work was commenced by the contractors on the 7th of June, 1864, and by the following October had advanced far enough to enable them to begin putting in the foundations of the piers. They proceeded with this work in strict accordance with the specification and the drawings. The caissons were duly constructed, and the proper measures were taken for preparing the ground and for lowering and sinking the caissons; but it was then found necessary to strengthen them by introducing additional iron girders and temporary internal struts and other supports. These alterations were made by order of the engineer, and by this means the difficulties were overcome, and the caissons were sunk to the full depth shown on the drawings.

After the separate caissons for forming one of the piers of the new bridge (as so altered and added to) had been lowered and sunk, and the foundations put in up to the level of the top of the permanent plates, it was found necessary, in consequence of the caissons not being of sufficient strength to resist the pressure of the water, to take away the two upper tiers of temporary plates, and to cut off the dam timbers to the top of the second plates. This brought the top

of the caissons considerably below high-water mark; and it became necessary to build the rest of the pier by tide work.

By the original plan (if practicable) the water of the river when once pumped out would have remained excluded (very little pumping being thenceforth needed to keep the interior of the caissons dry) and the work of laying the masonry within the caissons, removing the caissons, and otherwise completing the piers, might have proceeded without intermission. The caissons as altered were filled with water at each tide, and had to be pumped dry after half tide before any masonry could be laid or other permanent work executed, *and the work had thus to be done intermit- [169] tently, and at irregular times. This altered manner of executing the work was ordered by the engineer, and executed by the contractors, without objection, in all the piers of the bridge, and the piers were thus finally completed. By reason of the last-mentioned alterations, the contractors were delayed in the execution of the works, and put to considerable additional cost.

The difficulties in carrying out the work in accordance with the plans and designs of the engineer in the several respects before-mentioned were not known by the contractors at the time of entering into the contract, although they might have been discovered on careful examination of the specification and drawings by a civil engineer of competent skill and knowledge. The contractors had in their employment before and at the time of tendering for the contract a civil engineer, who saw the plans, but no such careful examination had in fact been made by him, or by any other person on behalf of the contractors.

The contractors acted on the assumption of the specification and drawings being fit and sufficient, and of the plan and method of executing the works, as shown and specified thereby, being fairly and reasonably practicable, and upon that assumption the quantities of the several materials which would be required, and the nature of the work, was calculated and estimated, and the tender was made. It was stated by the plaintiff and the civil engineer in his employment that it was the usage of contractors so to assume and to make their calculations and tenders upon that footing.

The bridge itself as finally built (notwithstanding any alterations in the mode of construction), was the same bridge as that originally designed by the engineer.

The contractors contended that the corporation having invited them to tender upon the specification and drawings as prepared by their engineer, must be taken to have guaran-

teed to them that the same were reasonably fit and sufficient for the purposes of the works, and that the works could reasonably and properly be executed in accordance with the same, and that the plan and method of executing the same, as shown and specified, were fairly and reasonably practi-
[70] cable, and consequently that the corporation *were liable for the several faults and defects therein as before-mentioned, and for the loss and damage thereby caused to the contractors.

The defendants contended that they were not liable, and that the advertisement, contract, plans, and specification did not show or contain, nor could there be inferred from them, any such implied warranty on the part of the defendants as was stated and alleged in the declaration, and that the alterations mentioned above, and the additional expenses thereby incurred by the plaintiff, were matters to be dealt with by the engineer of the corporation under the contract.

The question for the opinion of the court was, whether there was any, and (if any) what implied warranty on the part of the defendants to the effect stated in the declaration, or so as to give to the plaintiff a cause of action against the defendants.

If the court should be of opinion that such warranty existed, and that on the facts the plaintiff had a cause of action, then judgment was to be entered for the plaintiff for forty shillings damages with costs of suit.

If the court should be of a contrary opinion, the judgment was to be entered for the defendants with costs of suit.

Benjamin, Q.C., (Littler, Q.C., and J. W. Batten with him): The plaintiff is entitled to succeed if there is an implied warranty, or any cause of action disclosed on the facts. The work was to be done according to the specified method, and the failure of that was not contemplated by the parties. This damage is neither an extra, nor is it covered by the contract price. It amounts not to a mere addition or alteration, but to a total subversion of the whole original plan, and the substitution of a new one. The specification and contract provide nothing by way of indemnity in such case, the value of the alterations only being contemplated to be paid for as an extra, and this it is conceded has been done. There was an obligation on the contractors to do the work in three years, and it is the act of the defendants in not supplying proper plans that has prevented the plaintiff from doing this, and caused the loss.

[KELLY, C.B.: Suppose the contractors had declined to

continue *the works when they found the impossibility of carrying them on in this way.] [171

They might have done so, and sued the defendants, and their right to recover is not affected by continuing the work. The other clauses of the specification which expressly throw liability on the contractors, show that no further liability on their part was contemplated. If this work was done under the original contract, the plaintiff has been delayed two years in doing it, and for this delay he has not been compensated. If not done under that contract then he has been paid for what he did under the new contract, but has received no compensation for breach of the old one. [He referred to *Roberts v. Bury Commissioners* (*).]

Giffard, Q.C. (*Thesiger*, Q.C., with him): The only question is whether there is an implied warranty. The contract as to the mode of building, and as to the building itself, cannot be separated. It is quite immaterial who furnished the plans, for the plaintiff has contracted to build the bridge in accordance with them, in a certain time and for so much money. It is he that has broken his contract, and if the work turns out to be impossible, instead of merely, as it is contended is the case here, more difficult, he is still bound by his contract. There is no question here of the defendants' default in supplying anything they ought to supply, or in keeping back anything which was only within their knowledge, and there is nothing that can import into the case the alleged warranty. [He referred to *Scrivener v. Pask* (*); *Hills v. Sughrue* (*); *Marquis of Bute v. Thompson* (*).]

Benjamin, Q.C., in reply.

KELLY, C.B.: This is a case of very great importance to both the parties; but disengaging from the mass of matter before us all that portion which does not belong to the question we have to determine, the case is very simple. The corporation were desirous of entering into a contract for pulling down the old bridge of Blackfriars and substituting a new one. They employed an engineer to prepare plans and specification, which he prepared accordingly, *together [172 with whatever else was necessary to enable contractors to come forward and make tenders for performing the work. The plaintiff came forward and proposed to execute the works as pointed out in the specification, and with the materials and in the time pointed out, and accordingly the

(1) Law Rep., 4 C. P., 755; in error,
Law Rep., 5 C. P., 310.

(2) Law Rep., 1 C. P., 715.

(3) 15 M. & W., 253.

(4) 13 M. & W., 487.

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contract was entered into. The work was begun, and the contractor commenced, after pulling down the old bridge, to build the new one. He followed the directions of the specification, by which the foundations of the piers were to be laid by means of iron caissons; the dimensions and materials of which were set out in the specification. After having sunk and completed four tiers of caissons, the water was pumped out, and it was found that the two upper tiers were insufficient to keep out the tidal water, and that in consequence it was necessary to remove them, in which case the building operations could only be continued when the tide permitted. The consequence was, that much more time was necessary to complete the works than would otherwise have been required; and the plaintiff was prevented from entering into other contracts, and in a variety of ways was put to much greater expense than if the work could have been continued and completed in the time described in the specification. On this he insists that the cause of the injury he has received is that the specification was insufficient and delusive, and, in truth, that it was impossible to execute the work in the manner pointed out, and he brings this action, and insists that though nothing of the kind appears on the contract, the defendants impliedly contracted that the work could be carried on in the mode and with the materials specified. The question arises whether, the contract being silent as to any such warranty, we are to presume, nevertheless, that such was the intention of the parties, and that the defendants did impliedly warrant that this work could be executed and completed according to the contract, and in the way and with the materials specified.

No authority has been cited to show that in a contract of this kind there is any such implied warranty. We must beware how we hold that in contemplation of law people have contracted for something which is not to be found within the written contract to which they have put their hands, or that they must have intended something which [173] they have not declared they intended, and which *one of the parties in this case certainly did not contemplate, namely, that the work contracted for could be performed in the time and mode contained in the specification. There is no authority for so holding, and, looking to principle, it appears to me that we should be making a contract for the parties, and a different one from that into which they have entered, if we implied this warranty. It is said that the engineer was the agent of the corporation, and must be taken to have contracted for and on behalf of the corporation that

the specification was sufficient, and that it was reasonably practicable to execute the work in the mode prescribed; but the contract entered into by the plaintiff was absolute and unconditional, that he would execute these particular works for a certain sum and in a certain time.

Supposing it had turned out to be physically impossible to execute these works in the time named, could it be contended that because three years is named, the defendants have undertaken that the work can be executed in that time? It surely is a contractor's business to ascertain whether the work can be done in the time, judging as to that for himself from the mode in which the work is to be done, the materials to be used, and the other matters which he has to consider. How, then, can the corporation be said to have entered into an implied contract that the plaintiff could execute the works in the specified time? If a warranty to this effect had been alleged, the matter would have been hardly arguable, but the question whether the mode specified for doing the work is practicable, stands on precisely the same footing. Looking to the case, we find that the difficulties which prevented the work from being carried out in the manner originally contemplated were not known to the contractors or to the corporation. The latter had no more knowledge or means of determining this question than the former, and they took the advice of a competent person as to the work they desired to do. The other contracting parties might have done the same. It was evidently a case in which it was desirable that they should take the advice of a most competent engineer whether this work could be executed as proposed. How has the plaintiff any right to complain if, instead of arming himself with all the knowledge necessary to enable him to determine whether it was wise and prudent to take *the contract, [174 he enters into it without taking any of these steps in the matter? I cannot see that the corporation were bound to do more than they did, or that they incurred any liability on any warranty or promise entered into either by themselves or by their attorney or engineer on their behalf.

It is said, however, that if there be any other ground on which, upon the facts disclosed by the case, the plaintiff is entitled to recover against the defendant, we are at liberty to amend and adapt the record to the case set up. I can, however, see no right in the plaintiff under this contract except to be paid from time to time for the work he has completed, and that has been done. I am of opinion, therefore, that the defendants are entitled to judgment.

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PIGOTT, B.: I am of the same opinion. Looking at the question stated in the case for our determination, we have to see, first, if there is any warranty that can be implied, and next, whether there is any state of facts on which the plaintiff can recover. The contract has been carried out, and the bridge has been built according to the plans, though not by the method designated; but otherwise the contract is completed by the plaintiff building the bridge and the defendants paying the contract price and extras.

This claim comes under neither of those heads, but is a claim for the loss incurred by the plaintiff through the alteration in the method of building, which was found to be necessary through the failure of that first proposed. The corporation are in the ordinary position of a person who employs an engineer or architect to explain what he wants done to another, who, having the plans and specifications before him, tenders for the work. I do not see what more the defendants had to do than to carry out the terms of the contract. I cannot see that they expressly or impliedly warranted that Mr. Cubitt could not or would not fall into error. Mr. Benjamin has pointed out several clauses in the conditions, and has argued that as the corporation in the cases he refers to threw on the contractors an express obligation or liability, they did not do so in other cases. But the clauses he refers to only go to show that where they could anticipate a difficulty in doing the works they, by express contract, excluded [175] *the liability of the corporation. This only shows that, in those matters which the parties contemplated, and as to which they thought that differences might arise, they provided beforehand, but it does not touch this particular dispute which they did not contemplate. The argument placed before us is, that this work must be taken to have been represented to the contractors as practicable, but I can find no basis or materials from which to draw such an inference.

AMPHLETT, B.: I am of the same opinion. The plaintiff, instead of employing on his own account a competent engineer, made his tender on the footing of the plans and specifications of the engineer of the corporation, who was known to him as an engineer of eminence and reputation. The contractor chose to rely on his well-known ability. If there had been any case set up of an attempt to impose on the contractors, this matter would have assumed a different aspect; but nothing of this kind is suggested. The question which underlies the whole matter is whether the corporation impliedly contracted that the plans were such as to make the work reason-

ably practicable. To say that a contractor who has chosen to rely on the name and reputation of the person employed by the other party, when he finds that he should not have done so, can make the principal liable, is going far beyond any case that has been cited. I can see no implied warranty such as is contended for. I have great doubts whether this alteration which actually took place comes within the powers of variation contained in the contract; but the contractor did not raise this objection, but, as found by the case, proceeded with the works in the new mode specified by the engineer. He seems to have sanctioned the act of the engineer in making the alteration, and it is now too late for him to say it is a matter *dehors* the contract, and to require an indemnity for the extra expense he has been put to. This is, however, a minor point; the principal matter is that in the contract I cannot find the implied warranty which the plaintiff endeavors to set up.

Judgment for the defendants.

Attorney for plaintiff: *J. B. Batten.*

Attorney for defendants: *F. Brand.*

[Law Reports, 9 Exchequer, 176.]

May 8, 1874.

*CHILD V. HEARN.

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Duty to fence—Straying Animals—Railway—Negligence—Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20), s. 68—"Cattle."

The plaintiff, a platelayer in the employment of a railway company, was returning from his work along their line upon a trolley propelled by hand, when the defendant's pigs got through the fence of his field, which adjoined the railway, on to the line in front of the trolley; the trolley ran over the pigs and was upset, and the plaintiff was injured.

The defendant was owner of the adjoining land; the fence erected by the company under 8 Vict. c. 20, s. 68, was sufficient against horses, oxen and sheep; but there was enough space between the lowest rail of the fence and the ground for pigs to crawl through, and the defendant's pigs had in fact (as the jury found) crawled under the fence. There was evidence to show that the defendant had been warned on a former occasion of his pigs being on the line, but there was no evidence to show how the pigs got from defendant's farm yard, where they were last seen, into the field adjoining the railway. In an action against the defendant for the injury sustained by the plaintiff:

Held, first, that the word "cattle" in 8 Vict. c. 20, s. 68, included pigs, and that the fence was, therefore, insufficient.

Secondly, that, assuming there was negligence in the defendant, the plaintiff could not recover, for that he was identified with the company whose line he was using for their purposes, and through whose neglect to erect and maintain a sufficient fence the accident was caused.

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ACTION brought to recover damages for personal injuries caused to the plaintiff by the defendant's negligence⁽¹⁾.

177] *On the trial of the cause before Bramwell, B., at Westminster, in Hilary Term, 1874, it appeared that on the 12th of July, 1873, the plaintiff, who was a platelayer in the service of the Great Eastern Railway Company, was returning from his work upon their line, in company with his fellow workmen, and with tools and materials, upon a trolley worked by hand, when some pigs of the defendant broke from a potatoe bed by the side of the line and within the railway fence, and ran over the line. The trolley passing over two of the pigs was upset, and the plaintiff's leg was broken.

The defendant was occupier of the land on both sides of the railway, which was severed land, and which the railway company were (by 8 Vict. c. 20, s. 68⁽²⁾) under an obligation to fence. There was a fence consisting of posts and rails with quickset, which the jury found to be a sufficient fence against horses, oxen, and sheep; but there was a space of thirteen inches between the lowest rail and the ground, through which the pigs (which were described as 25s. pigs) might have crept, and the quickset was not grown enough to keep them out. The jury found as a fact that the pigs crawled under the fence. Some evidence was also given of the defendant having been warned on some pre-

(1) Declaration: first count: that the plaintiff was a servant of the Great Eastern Railway Company, and was lawfully travelling on the railway of the said company, on a truck or trolley; that defendant was possessed and in the occupation of a close of land near the railway, and by reason thereof ought of right to have kept his close fenced so as to prevent his cattle and other animals from escaping thereout on to the railway, and causing damage to persons lawfully on the railway. Yet the defendant did not keep fenced his close as aforesaid, whereby divers cattle or other animals, to wit, pigs, of the defendant's escaped out of the close on to the railway, and ran against the said truck or trolley, whereby it was upset and thrown off the line, and the plaintiff was thrown out and injured, &c.

Second count: that the defendant so negligently kept and managed certain pigs of the defendant's, that they ran against a truck on which the plaintiff was riding, whereby the truck was upset, and the plaintiff thereby injured, &c.

Pleas: 1, not guilty. 2, to the first count, that plaintiff was not lawfully travelling on the said railway as alleged. 3, to the same, that it was not any part of defendant's duty, nor ought he of right to have kept the said close fenced as, or for the purposes alleged.

Issue.

(2) 8 Vict. c. 20, enacts as follows: "And with respect to works for the accommodation of lands adjoining the railway, be it enacted as follows:

"Sect. 68. The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway, that is to say, . . . Sufficient posts, rails, hedges, ditches, mounds, or other fences, for separating the land taken for the use of the railway from the adjoining land not so taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway."

vious occasion of his pigs being on the line, but there was no finding by the jury as to this; nor was there any evidence to show how, on the present occasion, the pigs, which had been last seen in the defendant's yard, had got into the field adjoining the line, or thence on to the line.

The learned judge ruled that pigs were not included in the term "cattle" in 8 Vict. c. 20, s. 68; that the defendant was bound to keep his pigs within bounds; and that, treating the railway as a highway, he was answerable for the consequences of *their trespassing to any one lawfully [178 using it. A verdict was entered for the plaintiff for £100, the amount assessed by the jury, the learned judge reserving leave to the defendant to move to enter a nonsuit or a verdict for him, on the ground that there was no evidence to go to the jury of liability on the part of the defendant, or that, on the findings of the jury, the verdict ought to have been entered for him.

A rule was obtained accordingly, and also for a new trial on the ground of misdirection in the learned judge in telling the jury that the defendant was bound to keep the pigs from straying on the line, and was liable to the plaintiff for damage sustained by him in consequence of the pigs so straying, without proof of the circumstances under which the pigs so strayed, and that 8 Vict. c. 20, s. 68, did not include pigs under the term "cattle."

Bray (*Morgan Howard* with him) showed cause: First, it was not necessary that the plaintiff should show any negligence in the defendant, for the defendant was bound to keep the pigs within his own boundary, and was liable for any damage done by them if they escaped. The law is so laid down by Williams, J., in *Cox v. Burbidge* (*): "I apprehend the general rule of law to be perfectly plain. If I am the owner of an animal in which by law the right of property can exist, I am bound to take care that it does not stray into the land of my neighbor, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence, is altogether immaterial." This was cited with approval, and acted upon, in *Fletcher v. Rylands* (*). In *Cox v. Burbidge* (*) it was held that the defendant was not liable on the ground that the cause of action was an injury inflicted through the vice of the defendant's horse, and that there was no evidence of the scienter:

(*) 13 C. B. (N.S.), at p. 438; 32 L. J. (C.P.), 89, at p. 91. (*) Law Rep., 1 Ex., 265; Law Rep., 3 H. L., 330.

(*) 13 C. B. (N.S.), 430; 32 L. J. (C.P.), 89.

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May v. Burdett (') having laid down that in such cases it is the keeping of a mischievous animal with knowledge of [179] *its mischievous qualities, that constitutes the negligence, which, coupled with the consequent injury, gives the cause of action: see also *Read v. Edwards* ('). In *Lee v. Riley* ('), however, it is laid down that where the animal trespasses, it is immaterial that the injury done was due to his vice.

[BRAMWELL, B.: What was said there qualifies *Cox v. Burbridge* (') to this extent, that where the animal is a trespasser on the plaintiff's land so that damages must be recovered, the fact that an injury done by it was due to the animal's vice, may be immaterial with reference to the liability of the owner to damages; but the pigs were not trespassers as against the plaintiff; the injury done to him was the only thing that gave him a cause of action.]

If not trespassers as against the plaintiff in the sense that they were on his land, they were at least wrongfully upon the railway as against him in this sense, that he was lawfully using the line, which is a public highway, and they were wrongfully there obstructing his use of it, and thereby causing the damage complained of. But however it might be if this were a case of vice, that difficulty does not occur here, because this injury was not due to any vice in the animals, but only to the propensity to stray, which is common to all animals, and which the defendant was bound to guard against. Secondly, there was evidence of negligence in the defendant, for he had been warned before of his pigs being on the line; and, moreover, the fence was evidently insufficient against pigs of this size. Thirdly, the injury complained of was the natural result of the pigs straying, and, whether on the ground of the defendant's failure in his duty to keep the pigs in, or on the ground of special evidence of negligence, the defendant is liable for the consequences. If negligence is once established, it is no answer that it did much more damage than was expected: *Smith v. London and South Western Ry. Co.* ('); *Bailiffs of Romney Marsh v. Trinity House* ('); *Sneesby v. Lancashire and Yorkshire Ry. Co.* ('). Nor is it any defence [180] *to say that the negligence of the railway company (assuming them bound to fence) contributed to the injury:

(') 9 Q. B., 101; 16 L. J. (Q.B.), 64.

(') 13 C. B. (N.S.), 430; 32 L. J.

(') 17 C. B. (N.S.), 245; 34 L. J. (C.P.), 89.

(') Law Rep., 6 C. P., 14.

(') 18 C. B. (N.S.), 722; 34 L. J. (C.P.), 212.

(') Law Rep., 5 Ex., 204.

(') Law Rep., 9 Q. B., 263.

Hill v. New River Company ('). Neither, in any view, was there any negligence on the part of the company with respect to the plaintiff, for the obligation to fence, imposed by 8 Vict. c. 20, s. 68, exists only in favor of the owners and occupiers of the adjoining land, and is equivalent to a common law prescriptive obligation to fence: *Manchester, Sheffield and Lincolnshire Ry. Co. v. Wallis* ('); *Ricketts v. East and West India Docks, &c., Ry. Co.* ('); *Fawcett v. York and North Midland Ry. Co.* ('); *Bessant v. Great Western Ry. Co.* ('); there is no such obligation imposed on them as towards their passengers, still less as towards their own servants: *Buxton v. North Eastern Ry. Co.* ('). Nor could the plaintiff be identified with the alleged negligence of the railway company; the authority of the case of *Thorogood v. Bryan* (') has been much shaken by *Tuff v. Warman* ('), *The Milan* ('), and other cases: see *Smith's Leading Cases*, vol. i. p. 266, 6th ed.; and the true rule is that laid down in *Shearman and Redfield on Negligence*, p. 48, § 46: "Where the negligence of any other person is imputed to the plaintiff, it must appear that such person was the plaintiff's agent in the transaction, and either that he was under the plaintiff's control, or that he controlled the plaintiff's personal conduct" (').

[POLLOCK, B.: Is it not like the case of a man riding in a friend's carriage, which is so rotten that it is broken to pieces by what would do an ordinary carriage no harm? Would he not take on himself the risk of the condition of the carriage?]

*There seems no more reason why he should take [18] the risk of an ill-constructed carriage than of a negligent driver. But, lastly, the railway company was guilty of no negligence; for pigs are not included in the term "cattle" in 8 Vict. c. 20, s. 68. It must be admitted that they are within the definition of cattle as given in the dictionaries of

(') 9 B. & S., 308.

(') 14 C. B., 213; 23 L. J. (C.P.), 85.

(') 12 C. B., 160; 21 L. J. (C.P.), 201.

(') 16 Q. B., 610; 20 L. J. (Q.B.), 222.

(') 8 C. B. (N.S.), 368.

(') Law Rep., 3 Q. B., 549.

(') 8 C. B., 115.

(') 2 C. B., (N.S.), 740; 26 L. J. (C.P.), 263.

(') Lush., 388; 31 L. J. (Adm.), 105.

(¹⁰) The case cited in support of this proposition is *Eaton v. Boston and Lowell Railway Company* (11 Allen R., 500),

which was an action brought by a passenger against the carriers in respect of an accident caused by the joint negligence of the defendants and another company using their line under running powers. The defendants in effect asked the judge to rule that the concurrence of the negligence of others in causing the accident prevented the plaintiff from recovering against them, and the refusal of the judge so to rule was upheld by the court.

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Webster and Richardson⁽¹⁾, but they are not commonly spoken of as cattle; they are not domesticated to the same degree as the creatures which are commonly called cattle; nor are they so frequently fed in fields; and it is therefore unlikely that they were meant to be included.

Lanyon (Thesiger, Q.C., with him), for the defendant, was not called on.

BRAMWELL, B.: I am of opinion that this rule must be made absolute. By s. 68 of the Railways Clauses Consolidation Act, 1845, the railway company is bound to make a sufficient fence for the protection of the adjoining landowner. [The learned judge read the section, and proceeded:] The fence is to be sufficient for two purposes, for separating the land taken for the use of the railway from the adjoining lands not taken, and for "protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway." The company were therefore bound to fence against the defendant's cattle, and I think the word "cattle" in this section is sufficiently comprehensive to include pigs. Now the fence was not sufficient to prevent the defendant's pigs from trespassing, and it would seem to follow that the railway company must be liable for the consequence of the pigs escaping through it. But it does not follow as a consequence that they would be liable for any mischief done by any pig escaping on to the line through a defective fence. Nor do we lay down that there must be a fence so close and strong that no pig could push through it, or so high that no [82] horse or bullock *could leap it. One could scarcely tell the limits of such a requirement, for the strength of swine is such that they would break through almost any fence, if there were a sufficient inducement on the other side. But the company are bound to put up such a fence that a pig not of a peculiarly wandering disposition, nor under any excessive temptation, will not get through it. Now here the pigs had crawled underneath the fence before, and the owner of the adjoining field had been warned of it. It is plain, therefore, that the fence was not sufficient, and in my judgment the company could clearly not have maintained any action against the owner of the pigs for trespass,

(1) These definitions are as follows:—
Webster: "Cattle—beasts or quadrupeds in general, serving for tillage, or other labor, and for food to man," and the word is said to include "perhaps swine." Richardson: "Cattle—kine, horses, and some other animals

appropriated to the use of man;" and the following lines are quoted from Ben Jonson:

"Th' ignoble never lived, they were awhile,
Like swine or other cattell, here on earth."

and probably he might have maintained an action against them for any injury to the pigs through their getting on the line. At any rate, without saying how this might be, the fence was not sufficient.

The pigs then got upon the line through an insufficient fence, and caused injury to the plaintiff, and the question arises, is the defendant liable? What might happen if one of the public were injured in the use of the railway, which is a public highway, I will not say. The defendant might perhaps say, "I was not bound to fence;" but then the plaintiff might reply, "There was an opening through which you knew the pigs might get out of your field upon the line; you allowed them to be in the field, and I, using the road innocently, suffered injury through their escaping on to the line." But however that might be, here the plaintiff was a servant of the owner of property which was unfenced through the owner's default. It is manifest, as I have before said, that if the pigs got on to that unfenced property through its owner's default, the owner could not maintain an action; and, if so, it is impossible to say that a third person, using the property through the license of the owner, and on his behalf, can. The servant can be in no better position than the master, when he is using the master's property for the master's purposes. Therefore, without saying anything as to the decision in *Thorogood v. Bryan* (¹) it is sufficient to say that the defendant's pigs escaped through the negligence of the plaintiff's employer, and that, having met with the accident through his employer's negligence, the plaintiff can maintain no action against the defendant.

**PIGOTT, B.*: I am of the same opinion. The Rail- [183 ways Clauses Act, 1845, s. 68, commences with the words "the company shall make, and at all times thereafter maintain, the following works for the accommodation of the owners and occupiers of lands adjoining the railway;" the railway company then are to do the things mentioned, instead of the owners and occupiers. Then what are those things? They are to make and maintain "sufficient posts, rails, hedges, ditches, mounds, or other fences, for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or occupiers thereof from straying thereout by reason of the railway." Now, one need only consider the state of things produced by the making of a railway through an estate, to see how reasonable it is that

(¹) 8 C. B., 115.

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the owner, who is compelled to part with a portion of his land to the railway, should be relieved of the new and unlimited responsibility which would be otherwise cast on him of keeping in his cattle against the railway company and the passengers by their line. The reason of the thing certainly applies as much to swine as to other animals; but it is said the word "cattle" used in the act does not include them. Certainly, however, they are such animals as are commonly to be found kept like other cattle in the fields, in some parts of the country almost as commonly as sheep, in other places at particular seasons of the year. I see no reason for excluding them from the provision, and I think the word is wide enough to include them. I agree that the company are not bound to fence against animals of extraordinary capacities or under unusual conditions; but they must have a fence sufficient against ordinary cattle. Now here, the finding is, in effect, that the fence was sufficient against other cattle, but not against swine. It was therefore not a sufficient fence within the meaning of the act. The defendant then, it not being shown that he has been guilty of any negligence, is not responsible to the plaintiff for the accident which has occurred.

POLLOCK, B.: I am of the same opinion. It is unnecessary to discuss *Fletcher v. Rylands* ⁽¹⁾, or *Hill v. New River Company* ⁽²⁾, where it was held that the defendants [184] were liable because the *proximate cause of the injury was brought about by their negligence, and that they could not better their position by saying that the result would not have been so mischievous if the negligence of another person had not concurred to cause it; because here it is clear the injury to the plaintiff was caused by the want of a sufficient fence. It is clear also, as my Brother Bramwell has said, that the railway company could not have maintained any action against the defendant in respect of trespass by the defendant's pigs. But it is contended that nevertheless the plaintiff can, and that he ought not to be considered as identified with the company. If the case were within the passage cited from Shearman and Redfield this might be open to doubt, but that passage has no application to the present case, where the plaintiff met with his injury through being upon premises originally insufficiently protected by those in whose employment he was. This takes it out of the proposition laid down in the passage cited, and makes the case resemble the one I put during the argument, of a person riding in another person's carriage, which is so rotten

⁽¹⁾ Law Rep., 1 Ex., 265; Law Rep., 3 H. L., 330.

⁽²⁾ 9 B. & S., 303.

that a blow by some passing vehicle, which would have no such effect if the carriage were sound, breaks it in pieces. I think, that in such a case, the person riding in the carriage would be identified with the carriage in which he was riding. So here, the plaintiff is identified with the land which he was using for his own convenience; and that as the defective condition of that land, which was due to the owner's neglect, was the cause of the accident, the plaintiff cannot sue the defendant for the injury.

Rule absolute.

Attorney for plaintiff: *Christmas.*

Attorney for defendant: *Bromley, for Veley & Cunnington, Braintree.*

[Law Reports, 9 Exchequer, 185.]

[IN THE EXCHEQUER CHAMBER.]

May 14, 1874.

*DANIEL and Another v. STEPNEY and Another. [185

Landlord and Tenant—Rent-charge—Distress upon Lands not included in the Demise—Mines—Notice.

Upon a demise of mines a power of distress for the rent reserved was granted to the lessor over "any lands in which there shall be, for the time being, any pits or openings by or through which the coal or culm by the said deed demised shall for the time being be in course of working by the lessees, their executors, administrators, and assigns." The plaintiffs, being assignees of the lease with notice, under a trust deed made by the lessees for the benefit of creditors, sued the defendants for a distress made under the above-mentioned power, after the assignment, at pits not included in the demise, but referred to in it, and then worked by the lessees:

Held, that, whether the power was or was not a valid power of distress against strangers, the plaintiffs, taking as assignees with notice, were bound by it.

ERROR on the judgment of the Court of Exchequer in favor of the plaintiff on a demurrer to the defendants' plea.

After the judgment below was pronounced, as reported ('), the plea was amended, and (the parties intending to carry the case to the Exchequer Chamber) judgment was given without argument for the plaintiffs on a demurrer to the amended plea.

The case was argued in the Exchequer Chamber in the sittings after Hilary Term, 1873, and the case stood over for the defendants to apply at Chambers for leave to make certain suggested amendments. Leave to make these amendments was refused, and the case was re-argued.

The pleadings as they now stood were as follows:

Declaration: 1st count, for entering plaintiffs' lands and

(¹) Law Rep., 7 Ex., 327, where the pleadings, as they then stood, are set out.

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taking and carrying away fixtures and goods of the plaintiffs, and disposing of the same to defendants' use.

2d count, trespass *de bonis asportatis*.

Plea, on equitable grounds, that the lands mentioned in the first count of the declaration were the lands called "Carnarvon" in the lease thereafter set forth; that at the time [186] of the alleged *trespasses there were in the said lands, pits communicating with mines lying under certain lands of the defendant Stepney (called in the said lease the "described lands") and adjoining the lands in which, &c.; that at the time of granting the said lease Thomas Harries and others were possessed of the lands in which, &c., and of the mines and collieries under the same, for a term still unexpired, and were desirous of extending the workings and mines from those lands to the coal and culm under the said land of Stepney, adjoining the lands in which, &c., and more particularly described in the said lease, and Stepney, before the alleged trespasses, by deed leased the last-mentioned coal and culm to the said Thomas Harries, &c.

The plea then set out the lease, alleging it to be executed by the lessees, by which the defendant Stepney demised to Thomas Harries and others, for a term of forty years, the coal and culm under certain lands thereafter referred to as "the said described lands," with liberty to dig pits for winning and working the same, and also with liberty to bring minerals and substances underground from any workings for the time being in their occupation under adjoining or neighboring lands, for the purpose of bringing the same to bank on the "described lands," with certain surface rights accessory thereto; and also with liberty to win and work the demised coal by means of workings under the adjoining lands called "Carnarvon," then in the occupation of the lessees, and the pits sunk, or to be sunk, on such adjoining lands; paying a surface rent for land used, and a sleeping rent and royalty in respect of the coal and culm, and a wayleave for coal got under other lands and brought to bank on the "described lands;" with a covenant by the lessees to indemnify the lessor against any claims (if any should or could be made) by persons interested in any adjoining or neighboring lands by reason of acts or omissions of the lessees in respect of getting, laying, or disposing of the demised minerals in or upon such lands; and with a proviso that if any of the reserved rents, royalties, or wayleaves should be unpaid for twenty-one days after they should become due, the reversioner or reversioners might stop and hinder the loading and sending of any coal, culm, materials or

things from off the said premises, including as well the said "described lands," *as also any lands other than the [187 described lands in which there should for the time being be any pits or openings by or through which the coal and culm thereby demised, or any part thereof, should for the time being be in course of working by the lessees, their executors, administrators, or assigns, and for that purpose, and for the purpose of distraining, as thereafter mentioned, to enter into such other lands as well as the said described lands, and also to distrain all and every or any of the coal, culm, or materials, and also the horses, gins, &c., live and dead stock, materials, goods, chattels, and effects, standing and being, or used or employed in, upon, under, about, or in connection with, or as accessory to the coal and culm thereby demised, or any part or parts thereof, or in or upon any railway or tramway connected with any of the premises, and the distress and distresses then and there found to take, lead, and carry away, and to sell and dispose of the same, and generally to demand, in like manner as in cases of distress for rent reserved in common leases for years, and thereout to satisfy the arrears and costs.

The plea then stated that the lands described in the lease as "lands other than the described lands" referred to the lands in which, &c., and in which the said Thomas Harries and others, at the time of the demise, and the plaintiffs at the time of the alleged trespasses, had pits through which the said demised coal and culm could be most advantageously and easily worked; that certain of the rents, royalties, and way-leaves became in arrear for twenty-one days, and whilst they were unpaid, and before the alleged trespasses, the lessees assigned their interest in the lease, and in the lands in which, &c., to the plaintiffs in trust for the benefit of creditors.

The plea then set out the deed (which conveyed and assigned the whole property of the debtors), and proceeded to state that, save under the said deed, the plaintiffs never had any interest in or possession of the lands in which, &c., or the goods thereafter mentioned; that at the time of making the said deed the plaintiffs had notice and knowledge of the said lease, and of the covenants, provisions, and terms therein contained; that whilst the plaintiffs were such trustees as aforesaid, and possessed as aforesaid, and because the said rent was still due and unpaid, and *in [188 exercise of the rights granted by the said Thomas Harries and others as aforesaid, the defendant Stepney in his own right, and the defendant Rosser, as the servant and bailiff

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of Stepney, entered the lands in which, &c., the same being lands then used in connection with or as accessory to the said demised coal and culm, being parcel of the said adjoining lands called Carnarvon, and being the lands other than the said described lands referred to in the lease, and then being in all respects lands liable to the distress thereinafter mentioned, for the purpose of distraining for the said rent so due, and did then distrain therefor certain coal-wagons, carts, and other chattels and distrainable things, the same being then in the possession of the plaintiffs by virtue of, and which vested in them under and by virtue of the said assignment, and standing and being, or used and employed, in connection with the said works, in or upon the said lands in which, &c., doing no more than was necessary in that behalf, which are the alleged trespasses, &c., in the declaration mentioned.

Demurrer and joinder.

Joshua Williams, Q.C. (*Giffard*, Q.C., *Herschell*, Q.C., and *Trevelyan* with him), for the defendants, contended that the power of distress contained in the lease was valid at common law; and cited *Co. Litt.* 147, a.; *Butt's Case* ('); *Bacon's Maxims*, Comments on Reg., 14; *Fearne*, p. 528; *Jarman's Bythewood*, vol. iv., p. 162; *Locke v. Darley* ('); *Allerson v. Eden* ('); *Corbet's Case* ('); *Allen v. Givers* ('); *Casamajor v. Strobe* ('); but that if not valid so as to affect third persons whose goods might be seized under it, it was valid in equity as against the plaintiffs, who took as assignees with notice, citing *Staines v. Morris* ('); *Tulk v. Moxhay* ('); *Parker v. Whyte* ('); *Clements v. Welles* ('); *Sugd. Vendors and Purchasers*, 14th ed., app. 1, p. 799.

The court then called on

Manisty, Q.C. (*Murphy*, Q.C., and *Beresford* with him), 189] for the *plaintiffs, who, without arguing the first point, referred to *McLean v. McKay* ('), and admitted that on the second point he could not maintain the plaintiffs' contention.

PER CURIAM (*Cockburn*, C.J., *Blackburn*, *Keating*, *Mellor*, *Lush* and *Denman*, J.J.): We had all arrived at the conclusion that the judgment below must be reversed.

Judgment reversed.

Attorney for plaintiffs: *Hacon*.

Attorney for defendants: *Calcott*.

(¹) 7 Co. Rep., 28.

(²) 2 Dr. & W., 256.

(³) *Noy*, 5.

(⁴) 1 Co. Rep., 83 b., at p. 87.

(⁵) *Moor*, 179, 185.

(⁶) 2 Sw., 347, at p. 357.

(⁷) 1 V. & B., 8.

(⁸) 2 Ph., 774.

(⁹) 1 H. & M., 167; 32 L. J. (Ch.), 520.

(¹⁰) *Law Rep.*, 1 Eq., 200.

(¹¹) *Law Rep.*, 5 P. C., 327.

CASES

DETERMINED BY THE

COURT FOR CROWN CASES RESERVED

IN

EASTER TERM, XXXVII VICTORIA.

[Law Reports, 2 Crown Cases Reserved, 116.]

May 2, 1874.

*THE QUEEN V. FARRELL.

[116]

Evidence—Illness of Witness—Deposition—11 & 12 Vict. c. 42, s. 17.

At the trial of an indictment it was proposed to read the deposition of a witness on the ground that the witness was so ill as not to be able to travel. The evidence upon that point was as follows: The medical attendant of the witness was called and said: "I know M. L. She is very nervous, and seventy-four years of age. I think she would faint at the idea of coming into court, but I think that she could go to London to see a doctor without difficulty or danger. I think the idea of seeing so many faces would be dangerous to her, and that she is so nervous that it might be dangerous to her to be examined at all. I think she could distinguish between the court going to her house and she herself coming to the court." The witness whose deposition it was proposed to read lived not far from the court:

Held, that the deposition was not admissible.

CASE stated by Lord Coleridge, C.J.: The prisoner was indicted for embezzlement, and was tried at Stafford on Saturday, the 14th of March, 1874. In the course of the case for the prosecution, it was proposed to put in evidence the deposition of Mary Lee, the aunt of the prosecutor, who sold milk, but whose milk accounts were entirely kept and his milk business managed by Mary Lee, his aunt. To Mary Lee the prisoner had been in the habit of accounting. Mary Lee was alive, and was living in Stafford, not far from the court where the prisoner was being tried. Due proof having been given that her deposition was properly taken in the presence of the prisoner, and *with full opportunity [117 of cross-examination, it was proposed to read it under 11 & 12 Vict. c. 42, s. 17 ('), on the ground that she was so ill as

(¹) By 11 & 12 Vict. c. 42, s. 17: "In all cases where any person shall appear or be brought before any justice or justices of the peace charged with any in-

dictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily

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to be unable to travel. On this point Samuel Cookson, a doctor of medicine, being in Stafford, and the regular medical attendant of Mary Lee, gave the following evidence: "I am a doctor of medicine, living and practising in Stafford. I know Mary Lee. She is very nervous, and seventy-four years of age. I think she would faint at the idea of coming into court, but I think that she could go to London to see a doctor without difficulty or danger. I think the idea of seeing so many faces would be dangerous to her, and that she is so nervous that it might be dangerous for her to be examined at all. I think she could distinguish between the court going to her house and she herself coming to the court."

The learned judge received the deposition in evidence, and [118] the *jury convicted the prisoner; but reserved the question for the opinion of this court whether the deposition ought to have been received. If it ought not the conviction was to be quashed.

April 25. No counsel appeared.

Cur. adv. vult.

May 2. The judgment of the court (Lord Coleridge, C.J., Blackburn, J., Pigott, B., Lush, J., and Cleasby, B.), was delivered by

LORD COLERIDGE, C.J.: This was a case reserved by me at the last assizes at Stafford. The prisoner was indicted for embezzlement, and the case depended entirely on the evidence of Mary Lee, who was the aunt of the prosecutor and managed his business. She had been properly ex-

upon summons or have been apprehended with or without warrant, or be in custody for the same or any other offence, such justice or justices before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case and shall put the same into writing, and such deposition shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid, shall, before such witness is examined, administer to such witness the

usual oath or affirmation which such justice or justices shall have full power to do; and if upon the trial of the person so accused, as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and he or his counsel or attorney had a full opportunity of cross-examining the witness, then if such deposition purport to be signed by the justice by or before whom the same purports to have been taken it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof, unless it shall be proved that such deposition "was not in fact signed by the justice purporting to sign the same."

amined and cross-examined in the presence of the prisoner when the prisoner was before the magistrate, and it was now proposed to put in her deposition. The medical man, who was her regular attendant, gave the following evidence: "I know Mary Lee. She is very nervous, and seventy-four years of age. I think she would faint at the idea of coming into court, but I think she could go to London and see a doctor without difficulty or danger. I think the idea of seeing so many faces would be dangerous to her, and that she is so nervous that it might be dangerous for her to be examined at all. I think she could distinguish between the court going to her house and she herself coming to the court." It further appeared that she lived close to the court. It was proposed to read the deposition on the ground that the witness was "so ill as not to be able to travel" within the meaning of the 17th section of 11 & 12 Vict. c. 42. Certain cases were cited to me in which the words "so ill as not to be able to travel" have received a liberal interpretation. And as the prisoner had clearly embezzled the money, I admitted the evidence subject to a case for the opinion of this court. On consideration, we are all of opinion that this case was not within the words of the statute, and that it would be dangerous to admit any such latitude of construction as would bring the case within it. The conviction must therefore be quashed.

Conviction quashed.

[Law Reports, 2 Crown Cases Reserved, 119.]

April 25, 1874.

*THE QUEEN v. HENRY PEMBLITON.

[119]

Malicious Injury to Property—24 & 25 Vict. c. 97, s. 51—Malice—Intention.

The prisoner had been fighting with persons in the street and threw a stone at them, which struck a window and did damage to an amount exceeding £5. He was indicted under the Malicious Injury to Property Act for "unlawfully and maliciously" causing this damage. The jury convicted him, but found that he threw the stone at the people he had been fighting with, intending to strike one or more of them, but not intending to break the window:

Held, that by thus finding the jury negatived the existence of malice, either actual or constructive, and the conviction must therefore be quashed.

CASE stated by the recorder of Wolverhampton.

At the quarter sessions of the peace held at Wolverhampton, on the 8th of January, Henry Pembliton was indicted for that he "unlawfully and maliciously did commit damage, injury, and spoil upon a window in the house of Henry

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The Queen v. Pembliton.

Kirkham," contrary to the provisions of the statute 24 & 25 Vict. c. 97, s. 51. This section of the statute enacts: "Who-soever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or a private nature, for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding five pounds, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labor; and in case any such offence shall be committed between the hours of nine of the clock in the evening and six of the clock in the next morning, shall be liable at the discretion of the court to be kept in penal servitude for any term not exceeding five years, and not less than three, or to be imprisoned for any term not exceeding two years, with or without hard labor."

On the night of the 6th of December, 1873, the prisoner was drinking with others at a public-house called "The Grand Turk," kept by the prosecutor. About eleven o'clock, p. m., the whole party were turned out of the house for being disorderly, and they then began to fight in the street, and near the prosecutor's window, where a crowd of [20] from forty to fifty persons collected. The *prisoner, after fighting some time with persons in the crowd, separated himself from them and removed to the other side of the street, where he picked up a large stone and threw it at the persons he had been fighting with. The stone passed over the heads of those persons and struck a large plate-glass window in the prosecutor's house and broke it, thereby doing damage to the extent of £7 12s. 9d. The jury, after hearing evidence on both sides, found that the prisoner threw the stone which broke the window, but that he threw it at the people he had been fighting with, intending to strike one or more of them with it, but not intending to break the window, and they returned a verdict of "guilty," whereupon the learned recorder respited the sentence and admitted the prisoner to bail, and prayed the judgment of the court for Crown Cases Reserved, whether upon the facts stated and the finding of the jury the prisoner was rightly convicted or not.

No counsel appeared for the prisoner.

Underhill, for the prosecution: The finding of the jury as to intent is surplusage; directly it is proved that he threw the stone which caused the damage without just cause, the offence is established.

[LUSH, J.: That omits the word "maliciously."]

In this act there are a number of sections in which intent is a necessary ingredient to the offence, and in all of them this is expressed. Thus a distinction is drawn by the legislature, and if intent had been necessary here it would have been inserted. The common law rule as to malice is applicable here, and the consideration arises whether "the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, malignant spirit:" Foster's Crown Cases, p. 256: Russell on Crimes, vol. i. p. 667 (4th ed.). Then here the jury have found that the prisoner was actuated by malice.

[BLACKBURN, J.: But only of a particular kind, and not against the person injured.]

In *Reg. v. Ward* (1) the prisoner was charged with wounding with intent, and convicted of malicious wounding, though his intention was to frighten, not to shoot the prosecutor.

*[BLACKBURN, J.: There was evidence of malice in [121 that case, and so the conviction was upheld, but here the express finding of the jury negatives malice.]

In *Rex v. Haughton* (1) the prisoner set fire to a cow-house not knowing a cow was in it, and was convicted of maliciously burning the cow. So in Hale's Pleas of the Crown, p. 474, throwing a stone over a wall with intent to do hurt to people passing and killing one of them is treated as murder.

[BLACKBURN, J.: Lord Coke, 3 Inst., p. 58, puts the case of a man stealing deer in a park, shooting at the deer, and by the glance of the arrow killing a boy that is hidden in a bush, and calls this murder; but can any one say that ruling would be adopted now?]

The test is whether the act is malicious in itself as in the case of a person wilfully riding an unruly horse into a crowd: East, Pleas of the Crown, p. 231.

[BLACKBURN, J.: I should have told the jury that if the prisoner knew there were windows behind, and that the probable consequence of his act would be to break one of them, that would be evidence for them of malice. The jury might perhaps have convicted on such a charge, but we have to consider their actual findings.]

The 58th section, which renders it immaterial that there should be malice against the owner of the property or otherwise, applies.

[LORD COLERIDGE, C.J.: No, that means against the owner, or some one not owner.]

LORD COLERIDGE, C.J.: I am of opinion that the conviction

(1) Law Rep., 1 C. C., 356.

(1) 5 C. & P., 559.

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tion should be quashed. The facts of the case are that there was fighting going on in the streets of Wolverhampton near the prosecutor's house, and the prisoner, after fighting some time, separated himself from the crowd and threw a stone, which missed the person he aimed at, but struck and broke a window, doing damage to the extent of upwards of £5. The question is, whether under an indictment for unlawfully and maliciously injuring the property of the owner of the plate-glass window, these facts will support the indictment when coupled with the other facts found by the jury, that the [22] prisoner *threw the stone at the people intending to strike one or more of them, but not intending to break a window. I am of opinion that the evidence does not support the conviction. The indictment is under the 24 & 25 Vict. c. 97, s. 51, which deals with malicious injuries to property, and the section expressly says that the act is to be unlawful and malicious. There is also the 58th section, which makes it immaterial whether the offence has been committed from malice against the owner of the property or otherwise, that is, from malice against some one not the owner of the property. In both these sections it seems to me that what is intended by the statute is a wilful doing of an intentional act. Without saying that if the case had been left to them in a different way the conviction could not have been supported, if, on these facts, the jury had come to a conclusion that the prisoner was reckless of the consequence of his act, and might reasonably have expected that it would result in breaking the window, it is sufficient to say that the jury have expressly found the contrary. I do not say anything to throw doubt on the rule under the common law in cases of murder which has been referred to, but the principles laid down in such case have no application to the statutable offence we have to consider.

BLACKBURN, J.: I am of the same opinion. We have not now to consider what would be malice aforethought to bring a given case within the common law definition of murder; here the statute says that the act must be unlawful and malicious, and malice may be defined to be "where any person wilfully does an act injurious to another without lawful excuse. Can this man be considered, on the case submitted to us, as having wilfully broken a pane of glass? The jury might perhaps have found on this evidence that the act was malicious, because they might have found that the prisoner knew that the natural consequence of his act would be to break the glass, and although that was not his wish, yet that he was reckless whether he did it or not; but the jury have

not so found, and I think it is impossible to say in this case that the prisoner has maliciously done an act which he did not intend to do.

PIGOTT, B.: I am of the same opinion.

*LUSH, J.: I am of the same opinion. On these find- [123
ings we have no alternative. The jury might have found otherwise, but taking this finding I cannot say that there was an intent either actual or constructive, and "malicious" certainly must be taken to imply an intention either actual or constructive.

CLEASBY, B.: I am of the same opinion.

Conviction quashed.

Attorney for the prosecution: *Barrow, Wolverhampton.*

[Law Reports, 2 Crown Cases Reserved, 123.]

April 25, 1874.

THE QUEEN V. COOPER.

*Bailee—Agent—Fraudulent Misappropriation of Security—24 & 25 Vict. c. 96,
ss. 75, 76.*

The defendant, an attorney, was employed to raise a loan of money on mortgage, of which he was to apply a part in paying off an earlier mortgage, and to hand over the rest to the mortgagor. He prepared the mortgage deed, received the mortgage money, and handed over the deed to the mortgagee in exchange. He then misappropriated a part of the money to his own use:

Held, that no offence had been committed under s. 75 or s. 76 of 24 & 25 Vict. c. 96.

CASE stated by Grove, J.

In this case, tried at the last assizes for the county of Chester, the defendant, an attorney, was indicted under the statute 24 & 25 Vict. c. 96, for having converted to his own use certain money entrusted to him, or received by him as the proceeds of a deed entrusted to him for a special purpose. The indictment contained two counts framed respectively under the 76th and 75th sections of the above statute (').

(') By 24 & 25 Vict. c. 96, s. 75, "Who-
soever having been entrusted, either sole-
ly or jointly with any other person, as a
banker, merchant, broker, attorney, or
other agent, with any money, or security
for the payment of money, with any direc-
tion in writing to apply, pay, or deliver
such money or security, or any part
thereof respectively, or the proceeds, or
any part of the proceeds, of such security
for any purpose or to any person specified
in such direction, shall in violation of
good faith and contrary to the terms of

such direction, in anywise convert to his
own use or benefit, or the use or benefit
of any person other than the person by
whom he shall have been so entrusted,
such money, security, or proceeds, or any
part thereof respectively; and whosoever
having been entrusted, either solely or
jointly, with any other person as a banker,
merchant, broker, attorney, or other agent,
with any chattel or valuable security or
any power of attorney for the sale or
transfer of any share or interest in any
public stock or fund whether of the United

[124] *The facts, so far as they are material to the questions submitted to the court, were these:

A Mr. John Whittaker had, before 1867, obtained a loan of £50 from a Mr. Dewsbury on a deposit of title deeds to some leasehold property.

In consequence of Whittaker's wish for a further loan, the defendant in 1867 obtained £140 from a Miss Taylor, and prepared and handed to her brother-in-law, who acted for her, a mortgage deed, receiving the £140. Out of the money which defendant was to receive, he was to pay off Dewsbury and pay the balance to Whittaker. He did not pay Dewsbury, and he only paid Whittaker £60, on which Whittaker paid him interest, while the defendant, without Whittaker's knowledge, paid the mortgagee's interest on the £140, Whittaker being also ignorant, at all events for some years, that defendant had obtained so much as £140.

Allowing £10 for the preparation of the mortgage deed, which defendant's brother and former partner said was a fair sum, the defendant would have £70 of Whittaker's in his possession, less the difference of interest which he paid without authority.

Defendant's counsel contended that there was another £30 [125] paid *to Whittaker, which would reduce the sum to £40; but the evidence preponderated greatly against this. A good many letters were put in to show the defendant's conduct in the matter, but with these the court need not be troubled.

After reading to them the material parts of the evidence, the learned judge told the jury that if they were satisfied without reasonable doubt that the defendant received the £140 for Whittaker, and in violation of good faith and fraudulently converted to his own use a substantial part of the

Kingdom or any part thereof, or of any foreign state, or in any stock or fund of any body corporate, company, or society, for safe custody or for any special purpose without any authority to sell, negotiate, transfer, or pledge, shall in violation of good faith and contrary to the object or purpose for which such chattel, security, or power of attorney, shall have been entrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so entrusted such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to

which such power of attorney shall relate or any part thereof shall be guilty of a misdemeanor."

By s. 76, "Whosoever, being a banker, merchant, broker, attorney, or agent, and being entrusted, either solely or jointly with any other person, with the property of any other person for safe custody, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate the same, or any part thereof, to or for his own use or benefit, or the use or benefit of any person other than the person by whom he was so entrusted, shall be guilty of a misdemeanor."

money which they considered he should have paid to Whittaker and to Dewsbury for him, they should find him guilty; otherwise not. The jury found a verdict of guilty.

It must be taken by the court:

1st. That there were no directions in writing to the defendant to apply the money, or any part of the proceeds of the deed, to any purpose.

2d. That defendant was entrusted with the mortgage deed with authority to hand it over to the mortgagee or her agent on receipt of the mortgage money, which was to be paid to Dewsbury and Whittaker, less costs of preparing deed.

3d. That defendant received £140 for Whittaker's use, and in violation of good faith and contrary to the purpose for which such deed and money were entrusted to him, converted a substantial part of the money to his own use.

A copy of the indictment is annexed and formed part of the case.

The questions for the court were, did the offence committed by the defendant come within either or both the sections above named, viz., the 75th and 76th sections? If within both or either of them the conviction was to be affirmed, if not within either a verdict of not guilty to be entered.

INDICTMENT.

"County of Chester. The jurors for our Sovereign Lady the Queen, upon their oath present that Thomas Cooper, on the 25th day of March, in the year of our Lord 1867, then being an attorney, and being entrusted with certain property, to wit, the sum of one hundred and forty pounds, of John Whittaker, for safe custody, did then and there unlawfully, and with intent to *defraud, convert and appropriate [126 a certain part of the said property of the said John Whittaker, to wit, the sum of eighty pounds, to and for the use and benefit of himself, the said Thomas Cooper, against the form of the statute, &c.

"And the jurors, &c., do further present that the said Thomas Cooper, on the day and year aforesaid, was entrusted by the said John Whittaker with a certain valuable security, to wit, a deed of mortgage of certain property of the said John Whittaker, to secure the repayment of a sum of one hundred and forty pounds, then lately before agreed to be lent and advanced to the said John Whittaker by one Martha Taylor, such valuable security being entrusted to the said Thomas Cooper as the attorney and agent of the said John Whittaker, for the special purpose and with the intent and object that the said Thomas Cooper should receive from the said Martha Taylor the said sum of one

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hundred and forty pounds for and on behalf of the said John Whittaker, and having so received such sum should there-out pay the sum of fifty pounds then due and owing from the said John Whittaker to one Nathaniel John Dewsbury, and should pay the remainder of such sum of one hundred and forty pounds to and for the use of the said John Whittaker. And that the said Thomas Cooper having on the day and year aforesaid received from the said Martha Taylor the said sum of one hundred and forty pounds on the deed and valuable security above mentioned, unlawfully, fraudulently, in violation of good faith, and contrary to the purpose, intent, and object with which such valuable security had been so entrusted to him as aforesaid, did convert to his own use and benefit a certain part of the proceeds thereof, to wit, the sum of eighty pounds, against the form of the statute, &c."

Bowen, Q.C., (*Dunn* with him), for the prisoner, was stopped by the court.

Torr, Q.C.: The prisoner has committed an offence under s. 75, for he had the money for safe custody, though that was not the sole object of his employment. He has also committed an offence under s. 75, for though the first part of that section does not apply for want of a direction in writing, the latter part does.

LORD COLERIDGE, C.J.: I think the conviction must be [27] quashed. *The indictment contains two counts, founded upon the 75th and 76th sections of 24 & 25 Vict. c. 96. The 76th section is out of the question, because there has clearly been no improper dealing with any property entrusted to the prisoner for safe custody. Then does s. 75 hit him? The first part of the section cannot apply, because there was no direction in writing. The second part deals with a person who, "having been entrusted with any chattel or valuable security, or any power of attorney for the sale or transfer of any share, &c., for safe custody, or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been entrusted to him, sell, negotiate, transfer, pledge, or in any manner convert, &c., such chattel or security, or the proceeds of the same or any part thereof, or the share, &c., to which such power of attorney shall relate, or any part thereof." Now the facts of the present case are these. A sum of money was to be raised on mortgage, and the defendant was employed to raise it. Miss Taylor was to advance the money,

and a part of it was to be employed in paying off a previous mortgage, and the remainder to be paid over to Whittaker, his employer. The defendant duly prepared the mortgage deed, received the mortgage money, and handed over the deed in exchange for it. So far he acted rightly, and in accordance with his instructions. He afterwards misappropriated a portion of the money he had received. Such a case is not within the section. It applies where property entrusted without authority to sell or deal with it in the other ways mentioned, is improperly sold or otherwise misappropriated.

BLACKBURN and LUSH, JJ., PIGOTT and CLEASBY, BB., concurred.

Conviction quashed.

Attorney for prosecution: *Nordon, Liverpool.*

Attorney for prisoner: *Sherrat, Kidsgrove.*

[Law Reports, 2 Crown Cases Reserved, 128.]

May 8, 1874.

THE QUEEN V. FRANCIS.

[128]

Evidence—False Pretences—Previous Frauds—Guilty Knowledge.

On the trial of an indictment for endeavoring to obtain an advance from a pawnbroker upon a ring by the false pretence that it was a diamond ring, evidence was admitted that two days before the transaction in question the prisoner had obtained an advance from a pawnbroker upon a chain which he represented to be a gold chain, but which was not so, and endeavored to obtain from other pawnbrokers advances upon a ring which he represented to be a diamond ring, but which, in the opinion of the witnesses, was not so. This ring was not produced:

Held, that the evidence was properly admitted.

CASE stated by Blackburn, J.

The prisoner was indicted at Northampton Assizes jointly with one Joseph Roberts. The indictment contained counts for a conspiracy to defraud, and also a count for an attempt to obtain money from one George Walters by false pretences, *inter alia*, that a ring was a diamond ring; and a count for attempting to obtain money from Caleb Dyer by a similar false pretence.

On the trial, evidence was given that Francis came on the 8th of January, 1873, to the shop of Walters, who is a pawnbroker in Northampton, and asked for an advance of £15 on the pledge of a hoop ring, which he represented to be a diamond ring, a silver watch and a gold chain. The pawnbroker examined the ring and declared it was not a diamond ring. He refused to advance anything on it. The

prisoner, Francis, after asking for an advance of £11, left the shop.

Francis immediately proceeded to the shop of Dyer, who is also a pawnbroker in the same street, and asked for an advance of £13 on the same property. He obtained no advance, and was taken into custody on a charge of giving a false name and address under the Pawnbrokers Act.

The ring was produced in court, and evidence was given that the stones were not diamonds, but crystals, and were not worth more than 6*d.* each.

Francis' statement when taken, and his defence at the trial, was that he did not know that the ring was false, he [29] being employed, *as he said, by Roberts to pawn the ring, and believing his assertion that it was a diamond ring.

Evidence was then offered, in order to prove guilty knowledge in Francis, that he had shortly before offered other false articles to other pawnbrokers. The learned judge admitted the evidence, but as the cases relied on by the prosecution were all cases either of forgery or uttering counterfeit coin, he reserved the question whether on such a charge as this such evidence was admissible for the purpose of proving guilty knowledge.

A witness was called who proved that on the 6th of January, 1873, at Bedford, the prisoner Francis obtained 35*s.* from a pawnbroker of the name of Lazenby, on the pledge of a chain, represented by him to be a gold chain, and that he then gave a false name and address. The chain was produced in court, and evidence was given that it was silver coated with gold, and not worth 35*s.*

On the same day, the 6th of January, Francis, at Leicester offered to a pawnbroker called Stowe, who was called as a witness, in pledge a watch and a cluster ring, consisting, as he said, of diamonds, and asked for an advance of £15 upon them. The pawnbroker refused to advance anything, telling him the ring was not a diamond ring.

On the same day Francis offered in pawn to Taylor, also called as a witness, the son of a pawnbroker in Leicester, a watch and a cluster ring, which he said was a diamond ring, and asked £13 on them. Taylor thought the ring not a diamond ring, but did not say so to the prisoner. He told him that he could not advance so much in the absence of his father, and desired the prisoner to come again next day. He did not do so.

The cluster ring mentioned by these two witnesses was not produced in court, and the only evidence that it was false was the opinion of Stowe and Taylor that it was so.

There was no sufficient evidence against Roberts, and the learned judge directed his acquittal, and a verdict of not guilty on the counts for a conspiracy.

The learned judge left to the jury the case against Francis on the counts for an attempt to obtain money by false pretences, telling them that it was of the essence of the charge, not only that *Francis attempted to obtain the advance [130 on the ring as a diamond ring when it was not, but also that he then had guilty knowledge that it was not. And he left to them, as evidence of that guilty knowledge, the previous transactions.

The jury found him guilty.

The learned judge had no doubt that the evidence admitted had much weight with them, and therefore, if the evidence was improperly received, the conviction should be quashed.

The question for the opinion of the court was, whether the evidence above mentioned was properly received for the purpose of proving guilty knowledge.

April 25. *Hensman*, for the prisoner: Evidence of previous specific criminal acts is not, according to the general rules of evidence, admissible on the trial of a criminal charge: the cases of forgery and uttering are exceptional (1 Russell on Crimes, 4th ed. p. 127). In cases of receiving stolen goods, evidence of the receipt of other goods stolen from other owners was not at common law admissible: *Reg. v. Oddy* (*). The law as to receiving was in this respect altered by 34 & 35 Vict. c. 112, s. 19. In *Reg. v. Holt* (†) it was decided that, on a trial for obtaining money by false pretences, evidence of a previous obtaining of money from another by the same false pretences was inadmissible.

[BLACKBURN, J.: There the alleged false pretence was an assertion of authority to receive the money, and the question was authority or no authority. The evidence was wholly irrelevant.

LUSH, J.: May not this evidence be admissible to show that the prisoner knew true from false, and so to show fraudulent intent?]

Evidence is not admissible for that purpose where the facts offered in evidence themselves amount to a substantive crime. But further, if evidence be admissible for such a purpose, it must be directly to the point. And one part of the evidence admitted in this case was of a previous deal-

(*) 2 Den. Cr. C., 264; 21 L. J. (M.C.), 198.

(†) Bell Cr. C., 280; 30 L. J. (M.C.), 11.

ing with a sham gold chain. How can that show anything of the prisoner's knowledge of diamonds?

[BLACKBURN, J.: Such evidence appears to have been 131] admitted *in the case of murder by poison: *Reg. v. Geering* (¹) and *Reg. v. Garner* (²).]

In those cases, and in others like them, the several crimes proved were all parts of substantially one transaction.

[BLACKBURN, J.: In *Reg. v. Richardson* (³) like evidence was received in a case of embezzlement.]

Yes, but all the acts were part of one fraud.

[COLERIDGE, C.J., referred to *Reg. v. Gray* (⁴) as to arson.]

Moreover, if any such evidence as that tendered was admissible, it ought not to have been received without the production of the alleged fraudulent articles.

[PIGOTT, B.: Certainly, if the prisoner were on his trial for the alleged prior frauds, a conviction would not be allowed without production.]

And it is the same when they are proved for the present purpose. Even in cases of forgery, where more laxity prevails with regard to such evidence, production has always been required: *Reg. v. Millard* (⁵); *Rex v. Forbes* (⁶); *Rex v. Cooke* (⁷).

[*Reg. v. Findge* (⁸) and *Rex v. Whiley* (⁹) were also cited.]

No counsel appeared for the prosecution.

Cur. adv. vult.

May 8. The judgment of the court (Lord Coleridge, C.J., Blackburn and Lush, JJ., and Pigott and Cleasby, BB.), was delivered in the Court of Common Pleas by

LORD COLERIDGE, C.J.: In this case the question reserved for the court is, whether the evidence mentioned in the case was properly received for the purpose of proving guilty knowledge. No question is reserved as to the weight of that evidence, the judge who tried the case not entertaining any doubt that if the evidence was properly received the verdict was justified.

It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is, whether at the time he did it he 132] had guilty knowledge *of the quality of his act or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption

(¹) 18 L. J. (M.C.), 215.

(²) 3 F. & F., 681.

(³) 2 F. & F., 843.

(⁴) 4 F. & F., 1102.

(⁵) R. & R., 245.

(⁶) 7 C. & P., 224.

(⁷) 8 C. & P., 586.

(⁸) Leigh & Cave C. C., 390; 33 L. J. (M.C.), 74.

(⁹) 2 Lea. Cr. C., 983.

that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely he should be so often, than once, and every circumstance which shows he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last, and this is amply borne out by authority. In the case of *Rex v. Tattersall*, mentioned by Lord Ellenborough in *Rex v. Whiley* (¹), the question reserved by Chambre, J., was whether the prisoner had not furnished pregnant evidence, and whether the jury, from his conduct on one occasion, might not infer his knowledge on another. The opinion of the judges was that the jury were at liberty to make such an inference. The cases in which this has been acted on are most commonly cases of uttering forged documents or base coins, but they are not confined to those cases.

Now, in the present case, the prisoner was tried on two charges of attempting on the 8th of January, at Northampton, to obtain money from two different pawnbrokers by the false pretence that a worthless piece of jewelry consisted of real stones. Evidence that he, on the 6th of January, at Bedford, obtained money from another pawnbroker on the pledge of a chain which he represented to be gold, when it in fact was not gold, was surely matter from which the jury might infer that he was in a course of cheating pawnbrokers by knowingly passing off on them false articles under the pretence that they were genuine, and that inference was greatly strengthened by the fact that he at that time gave a false name, and though the charge on which he was tried was for attempting to pass off a false ring, the inference that he had guilty knowledge is as legitimate as if it had been a second false chain.

It was objected that the evidence of what took place at Leicester was not properly received, because the cluster ring which he there attempted to pass was not produced in court, and that the evidence of two witnesses who saw it, and swore to its being false, was not admissible. No doubt if there was not admissible evidence that *this ring was [133 false it ought not to have been left to the jury; but though the non-production of the article may afford ground for observation more or less weighty, according to circumstances, it only goes to the weight, not to the admissibility, of the evidence, and no question as to the weight of this evidence is now before us. Where the question is as to the effect of

(¹) 2 Lea. Cr. C., 983.

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a written instrument, the instrument itself is primary evidence of its contents, and until it is produced, or the non-production is excused, no secondary evidence can be received. But there is no case whatever deciding that, when the issue is as to the state of a chattel, e.g. the soundness of a horse, or the equality of the bulk of the goods to the sample, the production of the chattel is primary evidence, and that no other evidence can be given till the chattel is produced in court for the inspection of the jury. The law of evidence is the same in criminal and civil suits. The conviction, therefore, should be affirmed.

Conviction affirmed.

Attorneys for prisoner: *Phelps & Sidgwick, for A. J. Jeffrey, Northampton.*

CHANCERY APPEAL CASES,

(INCLUDING BANKRUPTCY AND LUNACY CASES),

BEFORE

THE LORD CHANCELLOR

AND THE

COURT OF APPEALS IN CHANCERY.

[Law Reports, 9 Chancery Appeals, 414.]

L.C. & L.JJ., March 2, 1874.

*MAYNARD V. EATON.

[414]

[1869 M. 180.]

Company—Transfer of Shares—Infant Transferee—Real Purchaser—Compromise of Action brought by Infant.

The defendant purchased, through his broker, 800 shares in a joint stock company, and gave directions that they should be transferred into the name of his son, G. E. On the same day the plaintiff instructed his broker to sell 100 shares in the company, and they were bought by the defendant's broker, on his account, through a jobber in the ordinary way, and were transferred to G. E., and were registered in his name. At that time G. E. was an infant, of which fact the plaintiff was not aware. Soon afterwards the company was wound up voluntarily, and G. E. then brought an action by his father, as next friend, against the plaintiff, who was an auditor of the company, charging him with fraud in selling the shares, knowing that the company was in an insolvent condition, and claiming damages. The action was compromised on the terms that all charges of fraud should be withdrawn, and that the purchase-money should be repaid to G. E. The liquidators on discovering that G. E. was an infant substituted the name of the plaintiff for his as a contributory of the company. The plaintiff then filed a bill against the defendant, charging that he was the real purchaser of the shares, and that the plaintiff was not aware of that fact when he entered into the compromise with G. E., and claiming to be indemnified by the defendant against all loss in respect of the transaction:

Held, by Malins, V.C., that the plaintiff was entitled to be indemnified, and that he was not precluded from maintaining the suit by the compromise with G. E.:

But *held*, by the Court of Appeal (reversing the decision of Malins, V.C.), that the compromise was an effectual bar to the plaintiff's claim to relief, and that the fact of his ignorance that the defendant was the real owner of the shares was immaterial.

THIS was an appeal from a decision of Vice-Chancellor Malins.

On the 4th of September, 1866, the defendant, Edward Eaton, a drysalter at Macclesfield, being at the time a share-

holder in the Bank of Hindustan, China, and Japan, gave directions to his broker, at Manchester, to purchase 300 shares of £100 each in that company, for the next settling-day, which was the 13th of September. On the 8th of September he wrote to the broker desiring him to have the shares transferred into the name of his son, George Eaton, whom he described as a drysalter, of Upton, Macclesfield. 415] *On the 4th of September the plaintiff, Frederick Maynard, who was the owner of 100 shares in the company, on which £26 had been paid up, gave directions to his broker to sell them for the 13th, and they were sold through a jobber in the ordinary way, at the price of £3 10s. per share, to the defendant's broker, who gave the name of George Eaton as the intended transferee.

On the 14th of September the purchase-money, amounting to £350, was paid, and the shares were transferred to George Eaton, who was shortly afterwards registered as the holder of those shares.

At the time of the transfer George Eaton was an infant of the age of seventeen years, but the plaintiff was not aware of his infancy.

On the 16th of November, 1866, the auditors of the company presented a report to the shareholders, giving an unsatisfactory account of the financial condition of the company; and soon afterwards George Eaton wrote to the plaintiff, who was one of the auditors, stating that he was only eighteen years of age, and charging the plaintiff with unfairness in the transaction, and claiming to have his purchase-money returned.

On the 10th of December, 1866, resolutions were passed for winding up the company voluntarily, and the winding-up was afterwards ordered to be continued under the supervision of the court.

On the 14th of February, 1867, George Eaton commenced an action against the plaintiff Maynard in the Court of Common Pleas by the defendant, Edward Eaton, as his next friend, charging fraud against Maynard and failure of consideration for the sale of the shares, and claiming damages.

Maynard pleaded to the action, denying the charges of fraud, but after the cause was set down for trial the action was compromised on the terms of George Eaton withdrawing all the charges of fraud and Maynard repaying the purchase-money to him.

George Eaton's name was originally placed on the list of contributories of the company, but the liquidators after-

wards removed it, and placed the plaintiff's name in its stead. The plaintiff alleged in his bill that the defendant Edward Eaton was the real purchaser of the shares, and that the purchase-money, when repaid under the compromise [416] mise, passed into his hands. He also alleged that he did not know or suspect at the time of the compromise that the defendant Edward Eaton was the real purchaser of the shares, or that they had been bought by his direction, but had discovered these facts subsequently. He therefore prayed for a declaration that the defendant was the real owner of the shares, and that he was liable to indemnify the plaintiff from all liability in respect of them.

The defendant stated in his answer that he had given his son £1,000 as an advancement, and that the shares were purchased for the benefit of his son, and paid for as part payment of that money. He also relied on the compromise of the action as a bar to the suit.

The Vice-Chancellor granted the relief prayed, being of opinion that the defendant was the real purchaser of the shares, and that the compromise was not a bar to the suit ('). From this decree the defendant appealed.

(¹) 1873. Dec. 16.

SIR R. MALINS, V.C., after stating the circumstances relating to the purchase of the shares, continued :

Now there can be no doubt whatever that, in full belief that George Eaton was a person capable of binding himself, the deed of transfer was forwarded to the father. The father was the attesting witness, and I am bound to attribute to him a knowledge that these were shares of £100, upon which £26 only had been paid at that time, and, therefore, they were liable to £74 more, and making altogether £7,400 ; and it is by his directions that this deed is prepared, by which a boy under eighteen years of age, with his full knowledge, is made to enter into a covenant which might involve an obligation of paying £7,400 in money. Is it possible that any court can justify that as a fair transaction on the part of the father ? It is said that he bought the shares for his son ; that he had given the son £1,000, and, therefore, the shares being bought for the son, were properly transferred into the son's name. Upon that I must observe upon the evidence that I cannot consider that the shares were, in the sense in which the words have been used by

the defendant's counsel, bought for the son. They were bought by the father himself. Every one of the letters he wrote to the stockbrokers desires them to buy shares for him, and the name of the son is not in any one of them. They were bought for himself ; and Mr. Barker, the broker who makes the affidavit, swears that from beginning to end of the transaction he never heard of the name of the son until the name was supplied to him by the letter of the 8th of September. He also says—and as a respectable man he could not do otherwise—that when the name of the son was supplied to him, he believed him to be of full age, and capable of binding himself.

Now, therefore, apart from other considerations which I shall have to advert to, this was a transaction in which Mr. Maynard, who was desirous of getting rid of his liability on the shares, ought to have got rid of it if fairness had been observed in the transaction ; if the father did buy for the son he was bound to know, and did know, that the son was incapable of taking on himself the obligations attached to the transaction ; if he bought for the son he was bound to put himself in the same situation as the son, and as

417] *Mr. *Cotton*, Q.C., and Mr. *Ince*, for the appellant: They were stopped by the court, and the counsel for the plaintiff were called on to show why the compromise was not a bar to the suit.

the son could not perform the obligations, to perform them himself. I cannot look upon the transaction as a fair transaction. I do not say the father intended thereby to commit a fraud; but I am perfectly clear that he intended thereby to evade the liability that attached to the shares; and his object in putting the name of the son must have been that, if the thing went well, the son would have the shares; if it went ill, the vendor would have nobody to whom he could look for indemnity, but would have to bear the brunt of the battle himself.

Can anybody say that such a transaction as that ought to be approved of? A purchaser who buys shares with liabilities on them is bound to know, and the court must attribute this knowledge to him, that the object of the seller may be to get rid of liability—the purchaser is bound to give the name of some person who will take on himself the liability, and therefore absolve the seller. That knowledge Mr. Eaton possessed. He was a shareholder in the company; he knew that it was in a tottering and weak condition—for a man who is a shareholder in a company whose shares have fallen from £26 to between £3 and £4, must know it is in a tottering condition, and a pure speculation whether the thing would go on or not—and, therefore, on every principle he was bound to know the obligations that were imposed on him, and that the seller sold them because he wanted to get rid of the liability, and the purchaser was bound to take the liability on himself. What is the consequence of this transaction? If Mr. Edward Eaton's name had been inserted, the question never would have arisen. Mr. Maynard fairly and honorably sold his shares in the market: he did not desire to keep them, and if he found a man who desired to have them, he expected to get rid of his liability. What is the consequence? The consequence contemplated by the father has taken place. The thing turned out disastrously. Mr. Maynard is to bear all the loss, and the father and son are

to bear none; while, if the thing had gone to a high premium, they would have sold the shares. Mr. Maynard would have got rid of the liability, but he never could have had any advantage from the transaction. Therefore on the original transaction it being perfectly clear that the father was the purchaser, and that the father had imposed on him the obligation either to take the shares in his own name, or to give another name on the naming day, as he has failed to do that, he is not absolved from the obligation now to indemnify him, to the same extent as if he had done it in the transaction as it originally stood.

Now if Mr. E. Eaton had been a jobber, his liability is settled by decisions. Can it make any distinction if he is not a jobber? In my opinion, none whatever. My view of the subject may be seen in the case of *Coles v. Bristow* (Law Rep., 4 Ch., 3). A jobber, the moment he purchases shares, as between him and the seller undertakes all the obligations of a purchaser; but by the custom of the Stock Exchange a jobber can get rid of his liability, as the decisions now stand, by giving another name. If he gives the name of an infant, he fails to comply with that requisition, and himself remains liable. Mr. Eaton is not a jobber, but a purchaser on the Stock Exchange; and as a jobber would have got rid of the liability by giving another name, it seems to follow that Mr. Eaton would have done just the same if he had given the name of an adult instead of an infant, and if that name had been accepted by the company as a person capable of relieving from liability, there would be an end of all question.

This is no longer open to speculation, because it has recently been settled by the Court of Appeal in the case of *Merry v. Nickalls* (Law Rep., 7 Ch., 733). It had been decided by the Master of the Rolls in *Hennie v. Morris* (Law Rep., 13 Eq., 203) that where a jobber or broker gave the name of an infant he absolved himself from any

*Mr. Glasse, Q.C., Mr. Higgins, Q.C., and Mr. [418
Grosvenor Woods, for the plaintiff :

At the time of the compromise the present plaintiff was en-

liability. That is overruled by *Merry v. Nickalls*.

In this case, therefore, when Mr. E. Eaton entered into the contract, he could not get out of its consequences except by supplying another name capable of accepting the transfer and paying for the shares. That he has not done, because he has given the name of a person who is absolutely incapable of accepting the transfer; and there being no acceptance of the transfer, nothing, in my opinion, can be more clear upon the facts which I have stated than that the defendant E. Eaton, by entering into the contract, is liable to Mr. Maynard, the seller, to indemnify him against all future calls, and to take the shares as they stood at that time.

Now, the case so far being very simple, there are several defences set up. First, it is said that the son was the purchaser. I am clearly of opinion, for the reasons I have already stated, that I must regard not the son as the purchaser, but the father. The father transacted every part of the business. The brokers who transacted the purchase for him prove that they understood they were acting for him; and I am bound to say that, in my opinion, this is an after-thought, when he says, that out of the £1,000 which he contemplated giving him (he does not pretend to say that he paid the money over to the son), he intended the price of these shares to be deducted. I am decidedly of opinion, whatever his intention may have been, he was acting on behalf of the infant, and he is not entitled to throw on the vendor the liability for the shares, but he is bound to stand in the same situation as if he had bought on his own account.

But then another defence is set up. It is said Mr. Maynard is not entitled to succeed in this suit because he has been guilty of fraud in the transaction, and he is by the answer distinctly accused of fraud in the transaction. Now what is the fraud charged against Mr. Maynard? It is that, having been appointed an auditor of this company in 1865, he had made a report of its

affairs dated the 10th of May, 1866, and was acquainted with the failing condition of the company. [His Honor then considered the facts in evidence on this point, and continued:] It is plain that Mr. Maynard knew no more than Mr. E. Eaton himself did. To attribute to Mr. Maynard, under those circumstances, any fraud in the transaction is, in my opinion, totally unjustifiable. That part of the defence, therefore, fails. Indeed, I am bound to say the learned counsel who appeared before me scarcely pressed that point.

Then the only remaining defence is this: It appears that Mr. E. Eaton, carefully concealing from Mr. Maynard the nature of the transaction, and concealing the fact that he was the purchaser of these shares, and keeping him in ignorance of this, took a step which I should say was a very unbecoming one. He brings an action in the name of his son as an infant, and he most improperly charges Mr. Maynard with fraud in the transaction, and seeks to get back the money on behalf of the infant. The case came on, and, under the advice of the counsel for Mr. Maynard, it is compromised on the terms of all charges of fraud being withdrawn and Mr. Maynard returning the money. Now on the other parts of the case I felt no doubt, but this part of the case is not absolutely free from difficulty.

Mr. Maynard states that his motive for compromising that action was not only that he felt he could not retain the money of an infant paid under such circumstances. He states that at that time the charges of fraud were utterly groundless; and I have already said I entirely agree with him on that subject. His affidavit states that the sale of the shares was made with perfect *bona fides*, and that he had not, at the time of such sale, any belief that the market price of shares in the company—at which the shares were sold—was more than they were worth. He had not, in fact, at that time commenced the investigation into the accounts of the company which led to the unfavorable

419] tirely *ignorant of facts that led to the filing of this bill. He made the compromise upon the faith of the son having bought the shares with his own money and for his own ben-

report issued to the shareholders, and he was ignorant of the financial condition of the company. But there was at that time great excitement in the public mind on the subject of joint stock companies, occasioned by the then recent severe panic, and great suspicion of directors and auditors of companies; and he was advised that the public would be under the impression that, as one of the auditors of the company, he ought to have been acquainted with all its affairs, and that, if he defended the action by stating the actual facts, he would not only severely prejudice his own reputation as a professional accountant, but also give rise to an unfair outcry against auditors in general; and he accordingly consented to the above-mentioned compromise. He says that he did not then know or suspect that the defendant was the real purchaser of the shares, and that they had been bought by him, or by his direction, and for his benefit; nor that he had paid for them out of his own money, nor that he had given the name of his son as transferee. He then states the circumstances as to the appointment of auditor, and of his receiving the report, and his total ignorance of there being anything unsound in the affairs of the company beyond what was stated in his report. If he had entered into the compromise with full knowledge of all the circumstances, I should have come to the conclusion that it was an actual bar to this suit. But nothing can be more clear than that, according to the doctrine of this court, if a person is induced to enter into the compromise of a claim, and one party is in possession of facts which he suppresses from the other, this court cannot allow that compromise to stand. I mentioned, in the course of the argument, the strongest illustration I knew of such a case; that was the celebrated case of *Gordon v. Gordon* (1 Mer. 141), decided by Lord Eldon. There being a doubt whether the elder brother was legitimate, he was induced to enter into a compromise, the second son being in possession of a fact which was not communicated to the elder

brother. The suppression of that fact, trifling as it was, vitiated the whole transaction. So in this case, a compromise entered into by the father in the name of the son, suppressing the fact that the father had been the real purchaser would, in my opinion, if it had been in this court, have entirely vitiated the transaction. On these grounds, I come to the conclusion that the compromise is not a bar to the suit.

Therefore, first, I decide in favor of the plaintiff on the ground that the defendant was bound to supply a good name, and not that of an infant; that Mr. Maynard, by the original transaction, had a right to require that of him; and, according to the words I quoted from Lord Justice James's decision, he has not given the name of a person who could take the contract from him and relieve Mr. Maynard. On that ground I am of opinion Mr. Eaton is bound to indemnify Mr. Maynard against the shares. The words of the prayer of the bill are "that it may be declared that, under the circumstances herein appearing, the defendant ought to be considered and treated as the purchaser from the plaintiff, and the owner of the said 100 shares." I do not know if those words "owner of the shares" are quite necessary. I was much pressed with the case decided by Lord Justice James, of *Castellan v. Hobson* (Law Rep., 10 Eq., 47). That was a case where A. bought shares on his own account; when the naming day came he gave the name of a servant incapable of bearing the brunt of the transfer. Lord Justice James there decided that was a vitiated transaction. Hobson was the real purchaser, though he gave the name of the servant as transferee. He made Hobson pay all the shares and indemnify the seller. He put it on the ground that the seller was a trustee for Hobson, the purchaser. If that be the true ground (and I entirely agree with it), it is equally applicable to this case, because, on the common principle of this court, directly the vendor sells property he becomes trustee for the purchaser, and the purchaser becomes trustee of the money for the seller. So

effit. The bill does not *attempt to set aside the com- [420
promise, but we contend that the plaintiff's rights against
the father are untouched by it. Whatever dealings he may
have had with the son, while in ignorance that he *was [421
a mere trustee of the shares, he has done nothing to prevent
him from claiming an indemnity against the real purchaser
when he has discovered him. The vendor of shares is en-
titled to a transferee who will absolve him from liability,
and as the father put in the name of an infant he must in-
demnify the vendor against the loss he has occasioned
him: *Merry v. Nickalls* (1); *Castellan v. Hobson* (2).

LORD CAIRNS, L.C.: I think it better to assume, for the
sake of argument, that the real owner of the shares was the
father, and that he was using the name of his son as the
purchaser, while intending to retain the benefit of them for
himself. There might be some fine shade of difference
between a father buying for himself and a father buying for
his son, intending *bona fide* to give his son the benefit of the
purchase. Putting aside such questions, I assume that the
father intended to purchase these shares for his own benefit.
But these shares were registered in the name of the son, and
before the action was brought for the rescission of the con-
tract the plaintiff Maynard was informed that the trans-
feree was an infant, and he knew that the shares had been
registered in the name of the infant, and he must have known
from the form of the action that the person bringing the action
was an infant, as he sued by his next friend. The object of
the action was clearly to have the contract rescinded under
which the shares were purchased from the plaintiff. Money
counts were, indeed, added, but the action was really for
that *purpose, and it was so treated by both parties. [422
Maynard tells us in his bill that he was induced to con-
sent to the compromise under which he paid back the pur-
chase-money because he considered that the action, if tried,
would raise the question whether his conduct had been cor-

when Mr. Maynard sold the shares, he
became trustee for Mr. Eaton. If the
shares had gone up £20 or £100 a share,
the day after the contract, Mr. May-
nard would have been a mere trustee
for Mr. Eaton. Mr. Eaton would have
had the advantage; if they went down
he must bear the disadvantage. If the
principle be that of trustee and *cestui
que trust*, Mr. Maynard became trustee
for Mr. Eaton, and Mr. Eaton is the
cestui que trust, according to the case
of *Castellan v. Hobson*; and on that

principle he is bound to indemnify the
trustee against all liability. That,
therefore, is the first ground.

The second defence equally fails, for
I am of opinion the compromise of the
action is no bar to this suit.

I must, therefore, make a decree in
favor of the plaintiff. It should be in
the same form as that in *Shepherd v.
Gillespie* (Law Rep., 5 Eq., 293).

(1) Law Rep., 7 Ch., 733.

(2) Law Rep., 10 Eq., 47.

rect with reference to the sale of the shares. However, the trial did not take place, and the compromise gave the plaintiff in the action the full benefit of his action and the purchase-money was returned to him. It was argued, and it was the only way in which the compromise could be got rid of, that Maynard at that time was ignorant of the fact that the father was the real owner of the shares. Supposing it to have been so, how could that have been in any way relevant to the validity of the compromise? Suppose Maynard had been told in court, when the compromise was about to be concluded, that the real owner of the shares was the father, I cannot imagine in what respect it would have been relevant, either in trying the action before a jury, or as to the terms of the compromise, whether the beneficial owner was the son or the father. The only person who could have brought the action was the infant whose name was on the register, and he was capable of maintaining it. The action having resulted in the rescission of the contract, the vendor had a right to be reinstated as the owner of the shares, and by being so reinstated he lost any right which he might have had against the father for any indemnity in respect of them. I cannot, therefore, think that the view taken by the Vice-Chancellor is right; I think that the compromise is an absolute bar to the suit, and that the bill must be dismissed with costs; but there will be no costs of the appeal.

SIR W. M. JAMES, L. J.: I am of the same opinion. I agree with the argument that the compromise would not have been binding if there had been any concealment of truth, or suggestion of what was false; but that must be understood as relating to what is relevant to the matter to be compromised. Whether the father or the son was the beneficial owner was immaterial to the question whether there was a valid sale of the shares. It was an action against the vendor by the real purchaser, whoever he might be, for the purpose of getting *rid of the contract; and whatever the vendor's motive may have been for consenting to the compromise, the effect of it was to put an end to the transaction, and to restore the shares to the vendor. Having thus put an end to the litigation, it is not competent to him to revive it now by bringing the bill against the next friend of the infant.

SIR G. MELLISH, L.J., concurred.

Solicitors for the appellant: Messrs. *Stephens & Stephens*.
Solicitor for the respondent: Mr. *J. Tucker*.

Where fraud has been committed by misrepresentation and false statements, and the aggrieved party with knowledge of the facts constituting the fraud, makes a compromise of the matter without suit, or, after suit brought to redress the wrong, he compromises such suit, the compromise should be held valid in law, although the party committing the fraud may reiterate such misrepresentations and false statements and affirm and reaffirm his integrity in the matter, in order to effect the compromise, and the aggrieved party may be thereby induced to make it. *Adams v. Sage*, 28 New York Rep., 108.

Where a party to whom representations are made has the means at hand of determining their truth or falsehood, and resorts to such means, and after investigation avows his belief that such statements are false, and acts upon such belief by bringing an action to recover money obtained from him by means of the fraudulent representations, he is not entitled to credit when he alleges that upon the reiteration of

the truth of the same statements, by the same party, he was induced to enter into an agreement to settle the suit and was thereby defrauded: *Adams v. Sage*, 28 N. Y. Rep., 108.

When a contract for the sale of goods, after having been executed on the part of the seller, is cancelled by the parties, and a new contract as to the mode of payment is substituted in place of it, the seller cannot rescind the sale and reclaim the goods, by reason of a fraudulent intent, on the part of the buyers, not to pay therefor, existing only at the time of the original contract. And the mere failure to perform the new contract is not sufficient to show that the fraudulent intent continued in respect to the new contract: *Sparks v. Leary*, 1 Robertson, 530, 19 Abb. Prac. Rep., 364.

On a plea that a bond was obtained by fraud and covin evidence is not admissible to show that the defendant executed it with full knowledge of its contents but in consequence of previous fraud: *Mason v. Ditchbourne*, 1 Moody & Robinson, 480.

[Law Reports, 9 Chancery Appeals, 423.]

L.C. and L.JJ., March 3, 1874.

*ATTORNEY-GENERAL V. TERRY.

[423

[1873 A. 32.]

Navigable River—Obstruction—Nuisance—Injunction—Conservators—Benefit of Trade.

A wharf-owner drove piles into the bed of a river, extending the wharf so as to occupy three feet out of a breadth of about sixty feet available for navigation:

Held, that this was such an obstruction as would be restrained at the suit of a municipal corporation empowered by act of Parliament to remove obstructions.

Decree of the Master of the Rolls affirmed.

Held, per the Master of the Rolls, that an owner of land at the side of a public navigable river has no right to erect on the bed of the river, for the benefit of his own trade, any structure, whether any actual obstruction to the navigation of the river will or will not be thereby occasioned; and any benefit to his own trade is too remote to be held for the advantage of the public generally, and so to justify the erection.

Rex v. Russell (1) disapproved of by the Master of the Rolls.

THIS was an information filed at the relation of the mayor, aldermen, and burgesses of the town and port of Sandwich against the defendant, Henry Terry, who was the owner of a mill and storehouses at Sandwich, and of a wharf or quay

(1) 6 B. & C., 566.

adjoining the same, and abutting on a part of the river Stour. 424] The object of *the information was to restrain the defendant from constructing any platform or piles so as to obstruct the navigation of the river.

The Stour is a small public navigable river forming the port or harbor of Sandwich, and by an act of Parliament passed in 1847 (10 & 11 Vict. c. cxcvi.), the mayor, aldermen, and burgesses of Sandwich, were empowered to cleanse and deepen the river. By the 12th section it was provided that the corporation should not, without the consent of the Admiralty and the Woods and Forests, construct any works in the haven where and so far as the tide flows and reflows. Other powers were given to the corporation, and by the 37th section their water-bailiff was authorized to remove any floating timber or other obstruction.

It appeared that the defendant, about the year 1857, had taken in a portion of the river on which his wharf was constructed, and had erected a quay or platform outside the wharf projecting two feet beyond it, and had placed some sloping piles within a short distance of the platform. No opposition was offered on the part of the corporation to these works.

In the year 1873 the defendant took away the old platform and piles, and put in their place three strong piles at points in the bed of the river between high and low water, projecting about three feet three inches from the face of the old platform. Upon these piles he was about to erect a framework of the height of twenty-two feet as the support of an upper platform or stage, projecting four feet eight inches over the river, and communicating with his storehouse.

The defendant had applied to the corporation for their permission to erect these new structures, which they had refused to grant, and, on his proceeding with the works, the present information was filed.

The information alleged that before the defendant commenced his works the river opposite his quay afforded a channel of barely sufficient width for the convenient passage of vessels along the same, and that by the proposed works the width of the channel would be substantially diminished, and the navigation would be attended with difficulty, and, moreover, that the yards and rigging of the vessels passing 425] along the same would be in constant danger *of coming in contact with the platforms and other works, and that, under the circumstances aforesaid, the defendant's works would seriously interfere with and obstruct the public right to navigate the river, and would be to the damage and common nuisance of all Her Majesty's subjects using the same.

The information prayed that the defendant, his workmen, servants, and agents, might be restrained from erecting or constructing, or causing or allowing to remain, any platform, piles, or other erections or works in or above the river Stour beyond the line of his quay, and from otherwise obstructing the navigation of the river or the public use of his quay, for the purpose of mooring of vessels along the same.

It appeared from the evidence that the river Stour at the point in question was seventy-six feet in width at high water, that it was deepest near the wharf, but that the bank opposite the wharf was shallow, so that only about fifty feet of the river from the wharf was available for the purposes of navigation, the depth beyond that distance being eight feet or less; that the vessels navigating the river were from eighteen and a half feet to twenty-one feet in beam, and that their draught of water was from eight to eleven feet.

There was a considerable amount of evidence on both sides as to the alleged obstruction of the river by the defendant's works. Part of the defendant's evidence was to the effect that the works complained of did not materially obstruct the river more than the quay which he had previously erected, and would in some respects be an advantage to the river.

The Master of the Rolls made a decree for an injunction ('), and the defendant appealed.

(¹) 1873. Dec. 10.

SIR G. JESSEL, M.R., after stating the facts of the case, continued: This information is founded upon two complaints. The one complaint is that the obstruction caused by the erection of the structure of the defendant will be a nuisance in the common acceptation of the term, that is, will actually impede the navigation of the river. The other ground is this: that whether that be so or not, the defendant has no right to erect such structure, and ought to be restrained by injunction, quite independently of the fact of there being an actual nuisance or not. I think the information is entitled to succeed on both grounds.

As regards the law upon the subject, it is necessary to say a word or two; because an argument has been addressed to me to this effect: that, admitting that it is some nuisance, or a little nuisance—that is, some interference with navigation—yet the rights of the public as to restraining a nuisance are confined

within reasonable limits, and that there may be such a public benefit arising from the works in question as would entitle the person or body erecting those works to say that the public benefit far more than counterbalanced the small impediment to navigation which the works occasion.

It was said that that had been decided in the well-known case of *Rees v. Russell* (6 B. & C. 566). In my opinion that case is not law, and it is right to say so in the clearest terms; because it is not well that cases should continue to be cited which have been virtually overruled, although the judges have not said so in express terms. In that case there had been some staiths erected in the river Tyne, and a very eminent judge of those days, Mr. Justice Bayley, in charging the jury, had pointed out that they were erected simply for the purpose of carrying on trade. He said (6 B. & C., 570) that "the staiths were not merely a private benefit, for that by means of them the coals were brought

426] *Mr. *Fischer*, Q.C., and Mr. *E. Beaumont*, for the appellant: We have a right to do all that is necessary to support our building. Moreover, our wharf is for the ad-

to market at a smaller expense and in a better condition, in both which respects the public were benefited;" and he then left to their decision the following questions: "Were the staiths erected in a reasonable place? Was there a reasonable space left for the public navigation in the Tyne? Were the staiths a public benefit? Did the public benefit countervail the prejudice done to individuals?" The jury said that in consequence of this direction they found the defendants not guilty.

The case was brought before the full court, consisting of the same judge, Mr. Justice Bayley, and two other very eminent judges, Mr. Justice Holroyd and Lord Tenterden. Mr. Justice Bayley adhered to his own opinion; Lord Tenterden differed; Mr. Justice Holroyd, though he came to the conclusion the verdict should not be disturbed, did not lay down the law quite in the same terms as Mr. Justice Bayley as regards the public benefit. As I understand it, he only put the law to this extent, that the public benefit might possibly countervail the public injury; for really they are both public, so that, taking it on the whole, the public was benefited.

That case came under discussion in the case of *Rex v. Ward* (4 A. & E. 384), where Sir William Follett, whose interest it was to support *Rex v. Russell* as far as he could, thus speaks of it (4 A. & E., 395): "The doctrine of *Rex v. Russell* need not come under discussion; nor is there any conflict of authorities. Erections may be made in a harbor, below high-water mark, and in places where vessels might perhaps have sailed; and the question whether they are a nuisance, or not, will depend on this: whether, upon the whole, they produce public benefit; not giving to the terms 'public benefit' too extended a sense, but applying them to the public frequenting the port."

I take it that that statement in argument of Sir William Follett was a correct statement of the law. Lord Denman, in giving the opinion of the full Court of Queen's Bench, says (4 A. & E. 402): "The greatest weight is due to the authority of Mr. Justice Bayley, who thus charged the jury, and after-

wards upheld his opinion in this court; and no person can hesitate to ascribe every quality of an excellent judge to Mr. Justice Holroyd, who agreed with him in thinking that the rule for a new trial for misdirection ought to be discharged. But, when we examine the grounds of this opinion, as delivered by the latter, they will not be found to support in any degree the proposition just noticed in the summing-up"—that is, in the summing of Mr. Justice Bayley—"on the contrary, he plainly considers the topic to have been introduced as an answer to some observations invidiously made to the defendant's prejudice, by the counsel who conducted the prosecution, and thinks that it must be qualified throughout the summing-up, and even to its close, by its connection with that argument. Mr. Justice Bayley himself, who delivered his judgment after Mr. Justice Holroyd, takes a much wider range, maintaining the right to estimate the balance of public benefit and public inconvenience, and to take into the account of the former the advantages that may be derived from the change by any part of the public. He takes for an example the purchasers of coals sent from the indicted staith to a distant market. Lord Tenterden thought it wrong to submit such extensive views to the jury, and that the question ought simply to have been, 'whether the navigation and passage of vessels over this public navigable river was injured by those erections.'"

Now that is the final judgment; but there had been a previous judgment, a short judgment, as to the whole of the case, and what Lord Denman said was this (4 A. & E., 400): "My understanding at the trial certainly was, that the question was much the same as that in *Rex v. Russell* (6 B. & C., 566), a case the authority of which has been much doubted, and is perhaps likely to be more so as it is further examined." So that it must be taken to have been the opinion of the full Court of Queen's Bench, in Lord Denman's time, that the summing-up of Mr. Justice Bayley in *Rex v. Russell* could not be supported; he does not say so in distinct and clear

vantage of trade: *Hale, de *Portibus* ('). No jury [427 would convict us on an indictment for nuisance. The obstruction is very trifling, and the river is narrower above

terms, but the effect of the judgment of the full court was, that they agreed with Lord Tenterden and disagreed with Mr. Justice Bayley. What really were the points on which they disagreed? I think they were two, and I think on those two points the charge of Mr. Justice Bayley was erroneous. In the first place, I think the benefit, whatever it is, must be a public benefit to the same public, that is, the same public who use the navigation, or, as it was put by Sir William Follett, "the public frequenting the port." In the next place, I think that the benefit to the public must be a direct benefit, whereas the benefit which he was considering was an indirect, and, as it appears to me, too remote a benefit. It was that coals came to the London market in rather a better condition, and were possibly sold at a lower price. That does not appear to me to be a public benefit in the sense of the term in which it ought to be used when considering the question of nuisance.

Then, it may be asked, what is a public benefit in my view? I say it is a benefit of a similar nature, showing that on the balance of convenience and inconvenience the public at that place not only lose nothing, but gain something by the erection. There are two cases in the books which will illustrate my meaning, and I think fairly show what sort of public benefit it is. The first is this: In the case of a tidal harbor of irregular shape it may be desirable to straighten the sides, the result of which would be, of course, in the parts where you take away the water-way, to diminish the area usable for navigation; in those parts where you add to the water-way you would increase the area. If, in the course of this straightening, the whole of the harbor is made larger and more commodious, then I think the public benefit gained at the particular point where the navigable water is narrow overbalances the public injury, and, in that sense, that improvement of the harbor would not be a nuisance; and that is what I understand Lord Hale intends to say in the passage which has been referred to.

Another case is this, which also appears in reported cases: Suppose you have a navigable river, and it is necessary to cross it by a bridge, and the river is too wide to allow of a bridge of a single span, you must then put one or more piers into the middle of the river, and, of course, according to the extent you introduce bridge piers or bridge arches into a navigable river, you to some extent diminish the water-way, and to some extent, perhaps to a more or less material extent, obstruct the navigation. But it is for the public benefit at that spot that a public road should be carried over the river by the bridge, and that benefit may so far exceed the trifling injury, if injury it be, to the navigation, that on the whole a court of justice may fairly come to the conclusion that a public benefit of a much greater amount has been conferred on the public than the trifling injury occasioned by the insertion of the piers into the bed of the river. In that case also it would be a public benefit that would counterbalance the public injury. I give those as illustrations, but I think it must be confined, as put by Sir William Follett in his argument, to cases of public benefit, and not used in too extended a sense.

In this case really I have no evidence whatever of benefit to the public. The defendant is doing this for the purposes of his own trade; it is too remote a benefit to the public to say that the encouragement of the trade of a single individual is therefore a benefit to the public. It seems to me to be an extravagant use even of the doctrine, had it been sound law, laid down by Mr. Justice Bayley in the case of *Rex v. Russell*. And therefore I cannot for a moment listen to the argument of the defendant on those grounds. Is there a nuisance? Counsel for the defendant admitted a little nuisance, and I take it that a little nuisance will support an information. The doctrine of this court is, no doubt, *de minimis non curat lex*. But that must mean something of a very trifling character. The instance given by Lord Cranworth in a case to which I am about to refer was merely putting in a

(') Hargr. Tracts, 85.

428] *and below. Moreover, the plaintiffs are not conservators, and have no right to file this information.

single stake in the stream, something too trifling to bear discussion; but where there is really an interference with the navigation, of course it is not within that doctrine. Then, is there an interference? Upon that, when you come to look at the facts, there really does not seem to be much room for argument. I cannot consider the comparison which has been so often suggested, both in the evidence and in the argument, of the illegal state of things produced by the defendant before he constructed these works, and the state of things produced by the new works. I must look upon it that the defendant has not acquired a right to keep his platform or his sloping piles there, and has chosen to remove them; that the case must be treated exactly in the same way as if they had never existed; and therefore the question is, whether erecting these piles, and putting up this platform in this narrow river, can, to a person of ordinary common sense, on the facts which I am about to state, be considered as an interference with the navigation. [His Honor then reviewed the evidence as to the width of the river, the size of the vessels navigating it, and the probable obstruction which the defendant's works would occasion, and continued:]

I am of opinion that this is a material obstruction to the navigation, and would be indictable at law as a nuisance. If it was necessary to rest my decision on that, I should have no difficulty in doing so; but I do not think it is necessary, for there is another ground also, and a ground of very great importance, upon which I say the informant is entitled to a decree, and that is this—that no man has a right to put an obstruction in the bed of a navigable river. As I understand the law, it is not an answer to say that at this moment the obstruction is not a nuisance: it may become so; a change may take place either in the mode of navigating the river, that is, as regards the vessels using the river, or a new mode of constructing vessels may be adopted, or a change may take place as regards the form of the harbor itself by removing an obstruction, or otherwise, which might make that navigable which was not before navi-

gable in any useful sense. If you allow the obstruction to remain, you allow the person erecting the obstruction to obtain by law, by reason of the lapse of time, a right to keep the obstruction there, so that when the time arrives at which the obstruction really impedes the navigation, you will not be able to remove it. It is for that reason so important that a person complaining of the obstruction, though not able to maintain an indictment for nuisance because an actual nuisance has not yet been committed, should be able to come to a court of equity and ask that court to restrain the continuance of that obstruction.

This matter has been considered several times. I will refer to two cases on the point, though they do not actually relate to a public navigable river. The first is a case of *Bickett v. Morris*, (Law Rep., 1 H. L., Sc. 47). That decided this—that in the case of a private river, where there were two riparian owners, each entitled to the soil *ad medium flum aqua*, both entitled to the uninterrupted flow of water, neither of those could erect on his own land any structure which might be eventually, though not then, an obstruction to navigation. Now, as Lord Westbury put it, this decision establishes the important principle that an encroachment on the *alveus* of a running stream may be complained of without the necessity of proving that damage has been sustained or likely to be sustained, the reason being that which I have given—that you cannot tell what may happen hereafter, and that the obstruction itself being allowed to remain will gain for the obstructor a prescriptive right. That was a Scotch case, but it was decided by English judges, and expressly on the ground that the Scotch and English law was the same; so it is an authority for English law. That is a case to a certain extent *a fortiori*, because there the man was erecting a structure on his own soil, the half part of the river belonging to him.

The point was considered as regards a navigable river in the case of *Attorney-General v. Earl of Lonsdale*, (Law Rep., 7 Eq., 377), where Vice-Chancellor Malins distinctly held that the same

*Mr. *Roxburgh*, Q.C., and Mr. *E. P. C. Hanson*, for [429 the relators, were not called upon.

*LORD CAIRNS, L.C.: In disposing of this case I [430 shall refer merely to those facts as to which there is no controversy; and I shall not have occasion to refer to those as to which there is a conflict of testimony.

The Stour is a navigable river, and is apparently much used by ships trading to the town of Sandwich. The navigation of the river has been placed under the guardianship of the corporation of *Sandwich by an act of Parlia-[431 ment passed in the year 1847. By one section of this act the corporation themselves cannot, without the consent of the admiralty, construct any work in the river below high-water mark; and by another section the water-bailiff, an officer of the corporation, is authorized to remove any obstruction in the river. This act, therefore, shows that it was thought of great public importance to preserve unimpeded the navigation of the Stour, and that a special duty devolved upon the corporation of Sandwich to keep the river free from obstruction.

[His lordship then stated the facts of the case, as showing that out of a width of about sixty feet available for navigation the defendant had taken three feet.]

It was argued before us that this was no real obstruction, and that therefore the court should not interfere; but this appears to me to be exactly one of those cases in which the

principle extended to a navigable river as regards interfering with navigation, and that in a case where the rights of the Crown had passed by grant to the defendant, Lord Lonsdale. There, again, it was a more favorable case for the defendant, because he was building on his own soil. In the present case the defendant has no right to put a stake in the soil of the Crown. It is a trespass to interfere with the soil. He is in a much more unfavorable position than the defendant was in either of the cases to which I have referred; but in those cases it was said, even without proof of damage either sustained or likely to be sustained, "You have a right to prevent that which may hereafter, under altered circumstances, become a nuisance, without proving that it is likely to become so." Here we have an *a fortiori* case; here is a case in which the defendant has been putting these things (they are called "piles"; they are structures of very great solidity and strength—very substantial structures

indeed—with a platform above them) into the soil of a navigable river, where the soil belongs to the Crown—a structure not of a trivial character, but, as it appears to me, a very substantial structure indeed; and I am not prepared to say that, even if the nuisance had not been proved, there is no apprehension of a nuisance.

It seems to me that the public body who have the guardianship of the river should have applied to the Attorney-General to stop the encroachments at the beginning. It perhaps shows how very desirable it would have been to stop him at the very beginning, that this defendant thinks that now to be a hardship which he would not have considered a hardship if he had been stopped fifteen years ago, when he first began the encroachments. I have no hesitation in granting an injunction according to the prayer of this information, and in ordering the defendant to pay the costs of the suit.

obstruction should at the outset be challenged by those who are conservators of the river. If three feet be taken at one time unchallenged, then six feet might be taken at another time. I cannot say that there might not be an encroachment of so trifling a nature that this court would not interfere, but a subtraction of three feet from sixty feet is a tangible and substantial interference with the navigation, and is a subtraction which ought to be challenged, and which ought to be restrained by this court. An error as to the tow-path has *per incuriam* crept into the decree, and must be corrected, but with that exception I think that the decree of the Master of the Rolls is right, and that the appeal must be dismissed with costs.

SIR G. MELLISH, L.J.: I am of the same opinion. It appears to me that the piles constitute an indictable nuisance, which a jury, properly directed by a judge, must find to be such. The piles have been placed in the stream of a navigable river, which is so narrow that every foot is wanted for navigation. It is true there may be spots in the river where space is not wanted, and where that which would otherwise be a nuisance might not be such an obstruction of the highway as to make it the duty of this court to interfere; but it appears that the space is actually wanted for the purposes of navigation, and in such a case there is no difference between a highway on land and a *highway on water. It is no answer to say that there is room for the ships, and that if they are navigated with skill and care there will be no obstruction. Those who use the river are entitled to say that they have a right to the whole of the space; and in my opinion it is not any answer that the obstruction only occurs at certain times of the tide, and that in some respects the alteration would be advantageous. The advantage of one person cannot be set off against the disadvantage of another. If this is an indictable nuisance there must be a remedy in the Court of Chancery, and that remedy is by injunction.

SIR W. M. JAMES, L.J.: I entirely concur. Where a public body is entrusted with the duty of being conservators of a river, it is their duty to take proceedings for the protection of those who use the river.

Solicitors for the relators: Messrs. *Prior, Bigg & Co.*

Solicitors for the defendant: Messrs. *Lowless, Nelson & Co.*

Obstructions in navigable rivers made in aid of commerce, which do not materially injure free navigation are not nuisances.

The court cannot pronounce a simple obstruction in a navigable river to be *per se* a nuisance. It must be so found as a matter of fact. Trade and com-

merce are the chief objects, and the right of passage is subservient to them.

A purpresture is *per se* a nuisance; but a dock built below low-water mark in a navigable river, which is authorized by law, is not necessarily a purpresture. The states within which are navigable rivers, have a right to exercise jurisdiction over their waters, and may authorize the erection of wharves—not extending beyond low-water mark—not materially obstructing navigation

—not to an extent to become a nuisance—except where such action is repugnant to the power “to regulate commerce with foreign nations and among states.”

Where there is no direct special individual injury, no action can be maintained by a citizen on the ground that his interests as a member of the state have been interfered with or disturbed. *Delaware, etc., v. Lawrence*, 2 Hun, 163, affirmed in Court of Appeals, February 24th, 1874.

[Law Reports, 9 Chancery Appeals, 432.]

L.J.M., Feb. 20; April 15; May 8, 1874.

Ex parte VILLARS. In re ROGERS.

Bankruptcy—Execution—Seizure and Sale—Act of Bankruptcy—Payment of Proceeds to Execution Creditor—Subsequent Bankruptcy—Bankruptcy Act, 1869, ss. 6, 87, 95—Sales made on different Days—Sale to Execution Creditor.

An execution levied by seizure and sale of a trader's goods for a debt exceeding £50, although an act of bankruptcy, is not for that reason necessarily a void proceeding; and if the execution creditor had no notice of a prior act of bankruptcy, and no notice of a petition for adjudication is given to the sheriff under the 87th section of the Bankruptcy Act, 1869, within fourteen days after the sale, the execution creditor is entitled to the proceeds of the sale notwithstanding a supervening bankruptcy.

The sheriff may make a valid sale by private contract of goods seized under an execution, to the execution creditor.

If the sheriff sells goods seized under the same writ on different days, all the sales will be considered one transaction.

Slater v. Pinder (¹) considered.

THIS was an appeal from a decision of Mr. Registrar Spring Rice, acting as Chief Judge.

*James Rogers was a dealer in fancy goods in the [433 Lowther Arcade in London, and had his private residence at Fulham. On the 27th of May, 1873, he gave to W. J. Villars a joint promissory note of himself and two other persons for the payment of £600 on demand, as security for a debt owing to Villars for furnishing his house at Fulham, and certain advances in cash.

On the 30th of June, 1873, Villars recovered judgment against Rogers in an action on the promissory note for £600, interest and costs. Execution was issued on the same day, and the sheriff's officer went to Rogers' shop in the Lowther Arcade, where he found the sheriff in possession under a previous writ for £43. The officer gave the man in possession notice of his writ, and served him with a copy of it.

On the 1st of July the sheriff seized Rogers' goods in his house at Fulham.

(¹) Law Rep., 6 Ex., 228.

On the 4th of July the sheriff, with the consent of Rogers, sold the furniture at Fulham to Villars, by private contract, for £363 3s., and on the 7th of July, in like manner, he sold the goods at the shop in the Lowther Arcade, the prior execution having been previously satisfied, to Villars for £338, making in the whole £701 3s. Separate bills of sale of the goods in the two houses were executed by the sheriff to Villars, and were duly registered, and Villars paid the price by two checks, one for £605 3s., which was the amount of his own debt and costs, and the other for £96, which included the sheriff's charges.

The sheriff kept the check for £605 3s. for the fourteen days required by the 87th section of the Bankruptcy Act, 1869, and then handed it back to Villars in satisfaction of his debt and costs.

On the 1st of August another creditor presented a petition for adjudication of bankruptcy against Rogers, the act of bankruptcy alleged being the seizure and sale under Villars' execution, and he was adjudicated bankrupt.

The Registrar, on the application of the trustee, made an order declaring that the two bills of sale of the 4th and 7th of July, 1873, were void as against the trustee, and ordering that Villars should deliver up the furniture and other goods purchased by him from the sheriff, and if any had been subsequently sold by him, that he should account for their value. 434] *From this decision Villars appealed, and the appeal was heard before Sir G. Mellish, L.J., on Feb. 20.

Mr. *Little*, Q.C., and Mr. *Robson*, for the appellant: The question turns upon the effect of the 87th section of the Bankruptcy Act, 1869 (').

With respect to the goods sold, it is quite clear that the sheriff can give a good title to them either before or after the fourteen days have expired, otherwise there could be no sale at all by the sheriff. The fact that the execution creditor was himself the purchaser makes no difference; for the

(1) 32 & 33 Vict. c. 71, s. 87: "Where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding fifty pounds, and sold, the sheriff, or, in the case of a sale under the direction of the County Court, the high bailiff or other officer of the County Court, shall retain the proceeds of such sale in his hands for a period of fourteen days, and upon notice being served on him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale, after deducting expenses, on

trust to pay the same to the trustee; but if no notice of such petition having been presented be served on him within such period of fourteen days, or if such notice having been served, the trader against whom the petition has been presented is not adjudged a bankrupt on such petition, or on any other petition of which the sheriff, high bailiff, or other officer has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him."

restriction imposed upon the sheriff by the 73d section of the Bankruptcy Act, 1861, not to sell otherwise than by auction, has been removed, and the sheriff may sell in whatever manner he thinks best. The order of the Registrar is therefore clearly wrong as to the goods. Then, with respect to the proceeds of the sale, we say that after the fourteen days have expired the payment by the sheriff to the execution creditor is valid. By the 73d section of the Bankruptcy Act, 1861, although the seizure of the goods was made an act of bankruptcy, it was expressly provided that the sheriff shall, "at the end of seven days after the sale, pay over the proceeds, or so much as ought to be paid, to the execution creditor, who shall be entitled thereto notwithstanding such act of bankruptcy, unless the debtor be adjudged a bankrupt within fourteen days from the day of the sale." It is true that there are no such words protecting the creditor in the present act, but it is not reasonable to suppose that the legislature *meant to alter the law in that respect. If so, [435 the result will be that an execution for sums above £50 will become practically useless, as the creditor will not be safe against being called on to repay the money at any time within twelve months. The 87th section says the sheriff is to "deal with" the money, which implies that he can make a valid payment; and the most reasonable construction of the act is, that although seizure and sale is an act of bankruptcy for other purposes, it is not so as regards the purchaser under the sale or the creditor who receives the money from the sheriff: *Morland v. Pellatt* (*); *Hernaman v. Bowker* (*).

Mr. *De Gez*, Q.C., and Mr. *Romer*, for the trustee: The 6th section, sub-sect. 5, of the Bankruptcy Act, 1869, makes the seizure and sale an act of bankruptcy, and, consequently, everything done under it must be void as against a subsequent bankruptcy within twelve months, unless there is something in the act to control it. The 87th section is only for the protection of the sheriff. That was expressly laid down in *Ex parte Pearson* (*). It may be that a purchaser from him is protected, because the act of bankruptcy is not committed till the sale is completed; but there is nothing in the section to protect the creditor who receives the money. The omission of the words which occur in the corresponding section in the Bankruptcy Act, 1861, is a clear indication of a change of intention of the legislature in this respect: *Ex parte Rayner* (*). The 95th section, sub-sect. 3, which protects executions made *bona fide* without notice, is made ex-

(*) 8 B. & C., 722.

(*) 11 Ex., 760.

(*) Law Rep., 8 Ch., 667.

(*) Law Rep., 7 Ch., 325.

pressly subject to the provisions contained in this section, and does not apply to executions which are in themselves acts of bankruptcy: *Ex parte Key* (¹). At all events the sale on the 7th of July is void, for there had been a previous sale on the 4th of July.

Mr. *Little*, in reply.

SIR G. MELLISH, L.J.: This case raises an important question as to the effect of the 87th section of the Bankruptcy 436] Act, 1869. The facts were shortly *these: The appellant had obtained judgment and sued out execution against Rogers, and on the 30th of June and the 1st of July, 1873, the sheriff's officer executed the writ at his houses in the Lowther Arcade and Fulham. It appears from the evidence of the sheriff's officer, that on the 30th of June he found an officer in possession at the Lowther Arcade under a previous writ, and that he gave him notice of the appellant's writ, and left him a copy of it. That, in my opinion, amounted to a seizure on that day under the appellant's writ. Then the sheriff sold the goods at the two houses to the appellant, and gave him two bills of sale on the 4th and 7th of July (the previous execution having been settled), and the appellant gave checks for the amount to the sheriff, who kept one of the checks till the fourteen days required by the statute had elapsed, and then handed it to the appellant in satisfaction of his debt.

The question to be decided is, whether the execution is valid *quod* the execution creditor himself. The 5th sub-section of the 6th section of the Bankruptcy Act, 1869, lays down as an act of bankruptcy, "that execution issued against the debtor by any legal process, for the purpose of obtaining payment of not less than £50, has, in the case of a trader, been levied by seizure and sale of his goods." There can be no doubt, therefore, that on the 4th of July, and again on the 7th of July, an act of bankruptcy was committed by Rogers. Supposing this sub-section had not been qualified by any other part of the act, what would have been the effect of the execution? Whatever is by the statute made an act of bankruptcy is entirely void as against the trustee in bankruptcy; therefore, if the 6th section had been unqualified, that levy by seizure would have been altogether invalid against the trustee, and the execution creditor could not have derived any benefit from it. But that enactment is qualified by the 87th section, and the question is, to what extent it is so qualified. [His lordship then read the section, and continued:]

(¹) Law Rep., 10 Eq., 432.

In the first place, I am of opinion that this section justifies the sheriff in selling the goods seized. He is to go on and sell notwithstanding it is an act of bankruptcy; and I think it was clearly the intention of the legislature to enable him to make a good transfer of the property in the goods to the purchaser. It could *not have been intended that if [437 there was a bankruptcy within fourteen days, the trustee under the bankruptcy, if he found that the expenses of the sale by the sheriff had been considerable, or if he thought he could make more of them by selling them at another time, should be able to go to the purchaser and say: "They are my goods, and you must give them back." If so, the purchaser would be entitled to an indemnity from the sheriff, which is never the case, as the sheriff gives no warranty with the goods.

It appears to me therefore clear that the trustee is only entitled to the proceeds of the sale after deducting the sheriff's expenses. If this were not so, the sheriff could never sell at all.

Then with regard to the passing of the property in the goods, I do not think that it makes any difference that the sale was made to the execution creditor himself. The law does not now compel the sheriff to sell by auction, nor is there anything to restrain him from selling to the creditor, who cannot be in a worse position than any other purchaser. If a petition had been presented within fourteen days, the only claim which the trustee could have had would have been to make the sheriff hand over the proceeds of the sale to him, and I think it follows that he cannot be entitled to more than the proceeds if the petition is not presented till after the fourteen days have elapsed.

Nor do I think it makes any difference that the sale in this case was made by two bills of sale on the 4th and the 7th of July. It appears to me that according to the true construction of the 87th section, the sheriff is to go on selling till he has realized enough to satisfy the execution, and if the debtor's goods are in different houses, and the sheriff sells the goods in one house on Monday, it cannot be intended that he should stop, and not sell the goods in the other house on Tuesday. In my opinion all sales made to satisfy one writ, after the goods have been seized under it, are within the protection of the 87th section, whether made on the same day or not.

We come then to what is the real question in the case, Who is entitled to the proceeds under the circumstances of the present case? Sub-sect. 5 of the 6th section makes every

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sale by a sheriff an act of bankruptcy, and therefore void as 438] regards the execution *creditor. Then the effect of sect. 87 is that the sheriff shall be protected, and that the purchaser shall be protected, but it does not say that the execution creditor shall also be protected. During the fourteen days the money belongs to the trustee if notice of a petition in bankruptcy is given within that time; therefore in that case it is void as regards the execution creditor.

Therefore the real question is, What is the meaning of the words at the end of the 87th section? They are these: "But if no notice of such petition having been presented be served on him within such period of fourteen days, or if, such notice having been served, the trader against whom the petition has been presented is not adjudged a bankrupt on such petition, or on any other petition of which the sheriff, high bailiff, or other officer has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him." No doubt those words protect the sheriff, but do they also mean that the money which was handed over to the execution creditor (which money, so long as it remained in the sheriff's hands, was the property of the trustee) shall become the property of the creditor? or only that the sheriff shall be protected in paying it to him, and that it shall remain subject to the claim of the trustee, so that, in case a petition in bankruptcy should be presented within twelve months, the creditor must hand it over to him? In my opinion, if the legislature had meant by that section to make that valid which by a previous section they had declared to be void, they would have said so in clearer terms. Reference has been made in the argument to the 73d section of the Bankruptcy Act, 1861; that was certainly an easier section to construe than the section in the late act. It enacts that the sheriff "shall, at the end of seven days after the sale, pay over the proceeds, or so much as ought to be paid to the execution creditor, who shall be entitled thereto notwithstanding such act of bankruptcy, unless the debtor be adjudged a bankrupt within fourteen days from the day of the sale." Those words are plain enough; but there are no similar words in the 87th section of the late act, and the court is left to infer what was the intention of the legislature. It was contended on one side that the legislature did not in 439] tend to alter the law as to the effect of the *payment to the creditor; on the other side it was contended that the legislature did mean to alter it. The mere change in the

language of the section would not be conclusive to my mind that the legislature intended to alter the law in this respect; for there are other instances in the act where the language has been varied without any change being made in the law. But in the present instance I think it would require some express words to make that valid which a previous section had declared to be invalid. If the legislature meant that the execution creditor should be entitled to keep the money after the expiration of the fourteen days, they would have said that after that time the seizure and sale should cease to be an act of bankruptcy. But it remained an act of bankruptcy, and as such it would invalidate all subsequent dealings with the bankrupt's property if a petition for adjudication was presented within twelve months; and if all subsequent transactions are rendered invalid by it, it would seem inconsistent and unreasonable that the transaction itself which is an act of bankruptcy should not be invalid. It is true that under the 73d section of the act of 1861 the payment to the execution creditor was made valid, but that does not appear to me a very reasonable enactment. It seems much more reasonable that the whole transaction should be void as regards the execution creditor. I think, therefore, that in this case the appellant, although he has a right to the goods purchased, is not entitled to keep the proceeds of the sale. He must, however, be allowed what he paid for the expenses of the sheriff. The order of the Registrar will therefore be varied, and it must be declared that the appellant should pay to the trustee the sum of £605 3s. There will be no costs of the appeal.

April 15. The case was reargued before the full court at the request of both parties, in lieu of an appeal to the House of Lords.

Mr. *Little*, Q.C., and Mr. *Robson*, for the appellant: The whole case really turns upon the question whether an execution levied by seizure and sale, which is made an act of bankruptcy *by the 5th sub-section of the 6th [440 section of the Bankruptcy Act, 1869, is for that reason altogether a void act against the trustee. We contend that it is not.

Under the Bankruptcy Act, 1861, the seizure by the sheriff was made an act of bankruptcy; therefore it was necessary to insert special words to give validity as against the assignees in bankruptcy to the subsequent sale and payment of the proceeds by the sheriff to the execution creditor, and this was done by the 73d section of that act in cases where there was no adjudication of bankruptcy within four-

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teen days. But by the act of 1869, sect. 6, sub-sect. 5, the act of bankruptcy is not completed till the sale. The execution creditor who has effected a seizure has a security on the goods which cannot be taken away without express words. The title of the trustee does not commence till the act of bankruptcy is "completed" (sect. 11), and the act of bankruptcy is not completed till the goods are delivered and the money paid to the sheriff. As soon as that is done the debt is gone; the relation of debtor and creditor is destroyed, and the proceeds of the sale are held by the sheriff in trust for the execution creditor, who can recover them in an action for money had and received: *Swain v. Morland* (1); *Morland v. Pellatt* (2); *Higgins v. McAdam* (3).

There is no reason why an act of bankruptcy should be in all cases in itself void. It is nowhere made so by act of Parliament. It is true that acts of the debtor himself, such as an assignment of all his goods, and payments by way of fraudulent preference, are void, because they are voluntary acts to defeat the other creditors; but an execution is not an act of the debtor, but an act of the creditor *in invitum*, which he has a perfect right to do. Therefore the proceedings under it are valid, except so far as they are made void by express words. It is clear that for some purposes an execution levied by seizure and sale is not void, for it is admitted that the sheriff can give a good title to the purchaser of the goods, even though he has notice of a petition in bankruptcy. The 95th section of the act expressly gives 441] protection to *bona fide* *executions, "subject and without prejudice to the provisions of this act relating to the proceeds of the sale and seizure of goods of a trader;" that is, the provision respecting the retention of the proceeds for fourteen days; but beyond that period there is nothing in any part of the act to interfere with the execution creditor's right: *Ex parte Roche* (4).

Mr. *De Gex*, Q.C., and Mr. *Romer*, for the trustee: If the title of the execution creditor in this case is upheld, it will be the first case in which it has been held that a title can be made through an act of bankruptcy. It has always been taken for granted that acts of bankruptcy are void in themselves. The doctrine rests on no positive enactment, but upon the policy of the bankrupt laws. No distinction has ever been drawn between acts of the bankrupt himself and those of creditors against him, and there is no differ-

(1) 1 Brod. & B., 370.

(2) 3 Y. & J., 1, 13.

(3) 8 B. & C., 722.

(4) Law Rep., 6 Ch., 795.

ence in principle between them. An assignment by a debtor of all his estate is not illegal or fraudulent in itself, and it would not be void unless it were an act of bankruptcy, and the same may be said of what is called a fraudulent preference of a creditor; it is only the fact that these acts are made acts of bankruptcy that makes them void. It all depends on the policy of the bankrupt law, which is, that where a man is in such a condition that he cannot pay all his creditors in full, one creditor ought not to be paid in full and the others get nothing. The same applies equally to an execution, although it is levied *in invitum*: *Belcher v. Magnay* (¹); *Ex parte Pearson* (²). The opinion of Baron Martin, in *Slater v. Pinder* (³), is distinctly in our favor. The fact of the omission in sect. 87 of the words "who shall be entitled thereto, notwithstanding such act of bankruptcy," are conclusive as to the intention of the legislature. The 95th section has no application to executions which are in themselves acts of bankruptcy: *Ex parte Key* (⁴).

Mr. Little, in reply.

*May 8. LORD CAIRNS, L.C.: The facts in this [442 case are very simple, and may be stated without detail; but the question raised is one of great general importance under the Bankruptcy Act of 1869.

The bankrupt is a trader. The appellant, on the 30th of June, 1873, recovered judgment against him for a debt exceeding £600, and on the same day a *fi. fa.* issued, and the sheriff seized under the judgment. The goods seized were assigned to the appellant, the execution creditor, who paid the sheriff the purchase-money, and the sheriff, after deducting rent and poundage, paid back to the appellant the sum for which the levy was made. All this took place more than fourteen days before the petition in bankruptcy was presented on the 1st of August, 1873. There is no attempt now made to impeach the regularity or good faith of the assignment to the execution creditor, and the case is practically the same as if the goods seized had been sold to a stranger, and the execution creditor had been paid his debt out of the proceeds.

The question is, under the circumstances I have stated, can the execution creditor retain the amount which has been paid to him, and is the trustee in bankruptcy entitled to recover either that amount or the goods seized?

The 6th section of the Bankruptcy Act, 1869, provides

(¹) 12 M. & W., 102.

(²) Law Rep., 8 Ch., 667.

(³) Law Rep., 6 Ex., 237.

(⁴) Law Rep., 10 Eq., 432.

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Ex parte Villars. In re Rogers.

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that one of the acts or defaults which shall be deemed to be an act of bankruptcy shall be when an execution issued "against the debtor on any legal process for the purpose of obtaining payment of not less than £50, has in the case of a trader been levied by seizure and sale of his goods;" and the 11th section provides, "that the bankruptcy of a debtor shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt."

It is necessary to consider whether these sections making the suffering of a levy by seizure and sale an act of bankruptcy avoid or make inoperative the seizure and sale itself, and in my opinion they do not. It is true that under this, as under previous statutes of bankruptcy, two acts are 443] specified, which if done by the *bankrupt are not only acts of bankruptcy, but are also, if followed by bankruptcy, void. One is a conveyance or assignment of the bankrupt's property for the benefit of creditors, and the other is a conveyance or assignment fraudulent, or by way of fraudulent preference. It is to be observed that as to one of these acts, namely, a conveyance or assignment by way of fraudulent preference, special provisions have always been made in bankruptcy legislation, making such a conveyance or assignment void by express enactment, and reducing it accordingly; and as to the other, namely, a conveyance in trust for all creditors, it has been held from the earliest times of bankruptcy law that as the effect of such a conveyance must be to delay or defeat creditors, the law will presume an intention to delay or defeat creditors, and the conveyance would therefore be invalid as against, and perhaps even without reference to, the policy of the bankruptcy laws; while as regards both these acts it is to be observed that they are the voluntary acts of the bankrupt, and on the same principle that they were originally styled "acts" of bankruptcy, may fairly be avoided and reduced, so as to bring back into the general estate the property affected by them. An execution, on the other hand, levied against the goods of a trader by his creditors, is the act not of the trader but of the creditor, and the creditor on his part is doing nothing which is censurable, either morally or legally. He is simply using the process of law which he is entitled to use, and nothing short of express words would, in my opinion, be adequate to cut down or deprive him of the effect of an execution which, *ex concessis*, he was entitled as of right to put in force. But there is another con-

sideration, which, as it seems to me, makes a marked difference between the case of a general or fraudulent conveyance by a bankrupt, and the case of an execution levied adversely upon his goods. In the case of a general conveyance or assignment which defeats or delays creditors, the conveyance or assignment must either be wholly set aside or must remain entirely effective; there is no *via media*. Bankruptcy, if the conveyance is not set aside, would have nothing to operate upon, and would be a mockery. So also in the case of a fraudulent preference, if the fraudulent preference is not avoided it remains valid, and the *property is absolutely withdrawn. There is no qual- [444] ified or conditional mode or measure of redress pointed out. But in the case of a seizure and sale it is altogether different. The act of 1869 has expressly provided by the 87th section that in the case of such a sale the sheriff is to hold the proceeds of sale in his hands for fourteen days, and if he has notice during that time of a bankruptcy petition presented against the trader he is to hold the proceeds, after deducting expenses for the trustee in bankruptcy, and it is only in cases where during these fourteen days he has no such notice, that he may at the end of the time hand over the proceeds to the execution creditor, which is, in fact, what was done in this case.

This appears to me to be the very clear and sufficient machinery given by the act itself, for the purpose not of rendering invalid the execution, or seizure or sale, but of giving to creditors of a trader a limited and qualified right to arrest the proceeds of sale, if they choose to do so with diligence. The convenience of such an arrangement is obvious, and if it had been intended by the legislature, in making seizure and sale of the goods of a trader an act of bankruptcy, to make the seizure and sale always and *ipso facto* invalid, as against a bankruptcy supervening, it would, in my opinion, have been much better, and much more natural, and it would certainly have been much more simple, to have enacted at once that there should be no process by seizure and sale against the goods of a trader in any case whatever.

The conclusion which I draw from the sections of the act to which I have referred is fortified by the other provisions of the act. I cannot find in the 15th and 17th sections any words which would vest in the trustee either the property itself, the completed sale of which to a third party is made the commencement of the bankruptcy, or the proceeds of the sale, which never belonged to the bankrupt. The 95th

section also appears to me to assume that the seizure and sale of the goods of a trader had not been made invalid by the earlier portion of the statute, but that certain qualified provisions only had been made with regard to the proceeds of sale. On the whole I am of opinion that the trustee in bankruptcy has in this case no right to recover 445] either the goods or the *proceeds, and that the summons before the Registrar ought to have been dismissed with costs.

SIR W. M. JAMES, L. J.: I entirely concur in the conclusion to which the Lord Chancellor has arrived. It appears to me that if the case had rested solely on the language of the 5th sub-section of the 6th section of the Bankruptcy Act, 1869, by which an execution for a sum exceeding £50 levied by seizure and sale is made an act of bankruptcy, it would have been the duty of the court if possible to construe the words of that enactment so as not to render invalid the act of the sheriff, done in strict obedience to the law, or the title of the purchaser derived from the law. And I think that the court can so construe those words as not to render the act of the sheriff or the title of a purchaser, which is derived from a sale made by him, invalid, by calling in aid the language of the 11th section, which enacts that the bankruptcy of a debtor shall be deemed to have relation back to, and to commence at the time of the act of bankruptcy, or the first of the acts of bankruptcy, "being completed," and treating the completed sale as the act of bankruptcy, at the time of which the bankruptcy is to be deemed to commence. If the act of bankruptcy is the act of the bankrupt himself, then the title of the trustee relates back to the moment of the commencement of the act done by him; but if, as in the present case, it is not a voluntary act of the bankrupt, but a proceeding *in invitum*, it relates back only to the moment after the completion of the transaction which constitutes the act of bankruptcy.

But it is not necessary to rely upon that view, because it is expressly provided in a subsequent section of the act (the 95th) that an execution executed in good faith shall not be void, that is, the act of seizure and sale is good in itself, but "without prejudice to the provisions of the act relating to the proceeds of the sale and seizure of goods of a trader." Therefore the ordinary legal consequences after execution must follow, and the proceeds must be handed over to the execution creditor, except so far as the act has interfered with those legal consequences. They are interfered with by the 87th section, which enacts that the sheriff shall retain

the proceeds for fourteen days to enable the general creditors to serve *him with notice of a bankruptcy petition. [446] During that period only the rights of the execution creditor are interfered with, and I am of opinion that that provision is the limit of the right of the general creditors in this case.

SIR G. MELLISH, L.J.: I am glad that my first impression of the law in this case has been corrected. No doubt the foundation of my opinion was that I treated the legislature as having made the act of bankruptcy itself void, unless there was something in the act to the contrary. I considered that I could not decide otherwise consistently with Baron Martin's opinion as to the effect of the 87th section, in *Slater v. Pinder* (¹); and it did not occur to me to question the rule laid down by that eminent judge, which had, as I believed, been received with satisfaction by the profession. As, however, a more careful consideration of the act has satisfied the other members of the court that the fact of an execution being made an act of bankruptcy does not necessarily make it void, it follows that the execution creditor is entitled in this case to have the benefit of his execution.

Solicitors: Mr. G. L. Norman; Messrs. E. I. Sydney & Son.

(¹) Law Rep., 6 Ex., 287.

[Law Reports, 9 Chancery Appeals, 447.]

L.JJ., March 11, 1874.

*CABALLERO V. HENTY.

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[1872 C. 107.]

Vendor and Purchaser—Specific Performance—Tenancy—Inquiry.

The conditions of sale of a public-house stated that it was in the occupation of a tenant. A brewer, intending to use the public-house for the sale of his beer, agreed to buy it. He afterwards learnt that it was under lease to another brewer for a term of which eight years were unexpired:

Held, (affirming the decree of the Master of the Rolls), that the purchaser was not bound to ascertain from the tenant the terms of his tenancy; and that in such a case the vendor could not enforce specific performance.

James v. Lichfield (¹) observed upon.

THE plaintiff in this case, on the 30th of October, 1871, put up for sale by auction at Arundel certain property, Lot 6 of which was in the particulars described as "All that capital freehold full-licensed public-house known as The General

(¹) Law Rep., 9 Eq., 51.

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Abercrombie, situate in Queen Street, Arundel, aforesaid, as the same is now in the occupation of Mr. T. W. Slatter at the low rental of £20 per annum, together with the two cottages at the back, each let at 2s. per week, as the same are now in the occupations of Burnand and Stillwell ;” and in the conditions of sale it was stated that “the properties are sold subject to the several tenancies now existing.”

The defendants were brewers at Chichester, and inferring (as they stated) that the tenancy of Slatter was from year to year, and wishing to buy the public-house for the purpose of extending their business, they directed one Peat to attend at the sale as their agent and buy it for them. The public-house was, however, in fact, under lease to an Arundel brewer for twenty-one years from 1859. It appeared that at the auction the lease was, at the suggestion of some one, read out by the auctioneer ; but there was much noise and confusion in the room, and the defendants’ agent asserted that he did not hear the lease read. The auction proceeded, and the defendants’ agent was declared the purchaser of Lot 6 for £600. He paid the deposit, and signed an agreement 448] *for the purchase, which agreement contained no reference to the lease. An abstract of title was delivered, and the purchasers’ solicitors made several requisitions, one of which was :

“The fifth condition states the properties are sold ‘subject to the tenancy now existing ;’ the tenancy now existing, if any, should be shown, and counterpart of any agreement (if any such exists) produced. An abstract of such document, moreover, should be furnished to complete the abstract.”

ANSWER.

“There has been a lease granted, which will expire in about nine years. Madame Caballero’s former solicitor, who prepared the lease, is dead ; search has been made for the counterpart amongst his deeds, but it cannot be found. Mr. Constable, the brewer, has the lease.”

In reply to this, on the 23d of November, 1871, the purchasers’ solicitors urged a search for the counterpart lease, a copy of which was, after other correspondence, sent on the 20th of December. Further correspondence took place as to other objections to the title ; and the purchasers’ solicitors then laid the papers before a conveyancing counsel. On the 19th of January they wrote requiring the lease (if valid) to be surrendered. The vendor’s solicitors answered that the lease was valid, and refused to obtain a surrender.

After more correspondence the bill in this suit was filed by the vendor, praying specific performance.

The Master of the Rolls, Sir G. Jessel, dismissed the bill with costs, and the plaintiff appealed.

Mr. *Roxburgh*, Q.C., and Mr. *W. A. Clark*, for the plaintiff, contended that the purchasers' agent heard the lease read, and that their solicitors knew all about it. Moreover the particulars showed that there was a lease, and then the purchasers were bound to inquire of the tenant: *Daniels v. Davison* ⁽¹⁾; *James v. Lichfield* ⁽²⁾; *Bailey v. Richardson* ⁽³⁾. The property was stated to be in the possession of a tenant, and that is notice of a lease: *Taylor v. Stibbert* ⁽⁴⁾.

*[The LORD JUSTICE JAMES referred to *Sugden's Ven-* [449
dors and Purchasers as to notice of a tenancy affecting a purchaser ⁽⁵⁾.]

Moreover, after the purchasers were aware that the lease was for this term of years, they did not object on that ground, and continued for nearly two months to negotiate.

Mr. *Waller*, Q.C., and Mr. *Stallard*, for the defendants, were not called upon.

SIR W. M. JAMES, L.J.: The judgment of the Master of the Rolls is, in my opinion, perfectly right, and it appears to me that this case is perfectly clear. [His lordship then stated the facts of the case:]

The defendants are brewers, and they authorized their agent to go to the sale and bid for this property, which they intended to buy, no doubt, in the ordinary way in which brewers buy public-houses, for the purpose of supplying it with beer.

Their agent was not authorized to buy a public-house with a lease for eight years to another brewer; in fact, it was the last thing he would have been authorized to do. He says that he did not hear the lease read; but even if we assume that he did hear it, and then signed the agreement, still, in the signed agreement there is no reference to the lease. In that state of things, it appears to me that the defendants are not bound to take this property, which was subject to a lease to another brewer for eight years, at £20 a year.

There is no pretence for the case made by the plaintiff, that a person who wants to buy such property, and has notice of the occupation of a tenant, is bound to go and inquire of the tenant what is the nature of his tenancy. For this proposition *James v. Lichfield* ⁽⁶⁾ was cited as an author-

(1) 16 Ves., 249.

(2) Law Rep., 9 Eq., 51.

(3) 9 Hare, 784.

(4) 2 Ves., 437.

(5) 7th Ed., p. 745; 14th Ed., p. 774.

(6) Law Rep., 9 Eq., 51.

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ity. In that case there certainly are some *dicta* which nearly go to that extent, and which support the notion that the doctrine of *Daniels v. Darison* (*) applies as between vendor and purchaser, and whilst the matter still rests in contract. It is not necessary now to deal with that case, but I am not at 450] present prepared to assent to any such *proposition. The doctrine in question seems to me to refer to equities between the purchaser and the tenant when the legal estate has passed, and to have nothing to do with the rights and liabilities of vendors and purchasers between themselves. If there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser, and to let him know what it is which is being sold; and the vendor cannot afterwards say to the purchaser, "If you had gone to the tenant and inquired, you would have found out all about it."

During the argument I referred to a passage in *Sugden's Vendors and Purchasers* (*), which seems to show that a purchaser is not bound to go to the tenant to inquire.

At all events, the vendor cannot enforce such an agreement as this.

His lordship then stated the facts as to the alleged waiver by the defendants, and came to the conclusion that the plaintiff could not enforce an agreement in which he had so completely misdescribed the property; and that the Master of the Rolls was right in dismissing the bill with costs.

SIR G. MELLISH, L.J., was of the same opinion. His Lordship thought that the misdescription was such that the vendor could not have enforced the agreement; nor had the purchasers, by their conduct, adopted the agreement subject to the alteration. The appeal must be dismissed with costs.

Solicitors for the plaintiff: Messrs. *Routh & Stacey*.

Solicitors for the defendants: Messrs. *Holmes & Son*.

(*) 16 Ves., 249.

(*) 7th Ed., p. 745; 14th Ed., p. 774.

[Law Reports, 9 Chancery Appeals, 451.]

L.JJ., March 10, 1874.

451] *WILTS AND BERKS CANAL NAVIGATION COMPANY V.
SWINDON WATER-WORKS COMPANY.

[1871 W. 1.]

Riparian Proprietors—Canal Company—Use of Water—Damage—Selling Water.

A canal company, having under their act power to supply their canal with water from the neighboring streams, bought a mill and turned the mill stream into the

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canal. Many years afterwards a water-works company diverted part of the mill stream, and thereby supplied with water a neighboring town:

Held, that the canal company, both under their act and as owners of the mill, were riparian proprietors, and had power to prevent the unlawful use of the water by other riparian proprietors, and that the supply of a neighboring town was such an unlawful use:

Held, that as the defendants claimed a right so to use the water, the plaintiffs were not (in order to support their bill) obliged to prove actual damage to the canal:

Held, that the canal company had not a right to require more water than they wanted for the purposes of the canal.

Seemle, nevertheless, that the canal company might sell any surplus water which remained after they had used it for the purposes of the canal.

Decree of *Malins*, V.C., reversed.

By an act 35 Geo. 3, c. lii., the Company of Proprietors of the North Wilts Canal Navigation were empowered to make and keep navigable a canal from the Thames, near Abingdon, to the Kennett and Avon Canal near Trowbridge, and also certain cuts or branches to the canal, and to supply the said canal and cuts or branches respectively, whilst the same should be making, and at all times for ever after the same should be made, with water, from all such springs as should be found in making the same, and from all rivers, springs, brooks, streams, and watercourses whatsoever, which were or should be found within the distance of 2,000 yards from any part of the said canal or cuts respectively, or from any reservoir or reservoirs belonging thereto, to be made as therein mentioned, and for that purpose to cleanse, scour, deepen, enlarge, or straighten any such rivers, brooks, streams, or watercourses, or any others which might come or be brought into the same *respectively, and to make [452 one or more reservoirs for the purpose of supplying the said canal and cuts, or any part thereof, with water.

These powers were continued by other acts, and by an act 1 & 2 Geo. 4, c. xcvi., the North Wilts Canal Company and other canal companies were united by the name of the Company of Proprietors of the Wilts and Berks Canal Navigation, and that company was empowered to maintain the canal and to supply it with water, the words used being nearly the same as those in the old act.

The canal was made, and from the year 1807 down to the year 1870 one of the chief sources of supply of water to the summit level was a stream called the Wroughton Stream. In the year 1807 the Canal Company bought a mill on the Wroughton Stream, called Wayte's Mill, for the purpose of obtaining the right of water, and they then diverted the stream, and though the mill was no longer used as such, the Canal Company claimed rights as millowners.

In the year 1866 a company was formed called the Swin-

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don Water-works Company, for supplying with water the town of Swindon, having a population of 7,000 or 8,000, brought there of late years by the establishment of the Great Western Railway Company's works, and being very badly supplied with water. In fact the Canal Company had for several years before 1867 sold the water of the canal to the railway company, for the use of the town.

The Water-works Company, in 1867, bought a mill called Bedford's, the wheel of which was turned by one of the principal springs which flowed into the Wroughton Stream. The company pulled down the mill and constructed on the site a reservoir, the effect of which was to divert into this reservoir, and out of the canal, many of the streams which used to flow into the Wroughton Stream and thence into the canal.

During the severe drought of 1870 the canal was so insufficiently supplied with water that the traffic was for seven weeks stopped. The Canal Company complained, and the Water-works Company then occasionally (as the Canal Company alleged) allowed the water to flow into the canal; but since November, 1873, they had, as the Canal Company alleged, entirely cut off the flow.

The Canal Company, on the 4th of January, 1871, filed 453] the bill *in this suit to restrain the Water-works Company from diverting the springs in question from the Wroughton Stream.

The defendants denied many parts of the case made by the plaintiffs, the conclusions on the evidence appearing from the judgments of their lordships. They admitted that they intended to continue the diversion of the springs for their own purposes and profits whenever the demand on them for water required it, though they denied that the diversion caused any loss to the Canal Company. They denied that since the 10th of February, 1871, they had, except on Sundays, diverted any water from the springs into their reservoir, but submitted that they were entitled to do so.

It appeared that the railway had carried off nearly all the traffic from the canal, and that in 1868 the company were considering whether the canal could not be closed and the assets realized and divided. There was, however, still some traffic on the canal.

The Vice-Chancellor Malins dismissed the bill with costs (1), and the plaintiffs appealed.

(1) 1873. Dec. 3.
SIR R. MALINS, V.C., after stating the facts of the case, said that

The litigation raised a question of the utmost public importance, because if the plaintiffs were right, it followed

*Mr. J. Pearson, Q.C., and Mr. Roupell, for the [454 plaintiffs: It may be true that our canal is not very prosperous, but that is no reason why we should be deprived of

that this Canal Company, and every other canal company with similar powers—and most of the canal companies had such powers—had a right to interfere with the use of water to such an extent, that no water-works for the supply of the inhabitants of a district, or for any other useful purpose, could be established in the neighborhood of a canal like this without the permission of the Canal Company. This, however, depended upon the powers given by the acts of Parliament. One question was whether those acts gave the company the rights of riparian proprietors. His Honor entirely agreed with the doctrines laid down in *Bealey v. Shaw*, (6 East, 208); *Mason v. Hill* (5 B. & Ad., 1); *Wright v. Howard* (1 S. & S., 190); *Miner v. Gilmour* (12 Moo. P. C., 131); *Nuttall v. Bracewell* (Law Rep., 2 Ex., 1); and if he had come to the conclusion that the Canal Company were riparian proprietors, he should probably upon the evidence have held that the water-works company were not making an ordinary use of the water, and must be restrained.

[His Honor then proceeded:]

But what was the intention, and what must I assume to have been the intention, of the legislature in giving these powers? They must, in 1795, have been well aware that the population of this country was then (as it has been ever since) increasing, and that new towns would be established, and new districts arise, and new wants would have to be supplied, and among those wants one of the most important would be a supply of water. If a riparian proprietor may take water from the channel flowing through his land for the purpose of his cattle, surely he must be able to take it for his own use, or for the use of his family, and so forth. Must it not be understood that inasmuch as all the streams in this district within 2,000 yards were to be used, that among the wants that were to be supplied would be the necessity of supplying water to human beings massed together in large numbers? Therefore I do not read this power to supply the canal with water as giving the same

powers which a riparian proprietor would have. My opinion is, that this Canal Company has not such great powers as a riparian proprietor, but can only take such water as they can find after it has been applied to all the purposes for which mankind in the neighborhood may require it. I do not mean that any one is at liberty to divert the stream altogether. For instance, in this very case, if the defendants had gone to the very springs in question, and had made a channel drawing the water away to another river, that would have been an improper use of the water. That would not be the ordinary use of the water; but to take water in that district to supply human beings living in that district seems to me a proper use—as proper as any to which it could be supplied, and one which I must assume the legislature would have authorized, and did not intend to interfere with by giving these powers to the Canal Company. Therefore, in my opinion, the right given by the original act of Parliament is not an absolute right to take all the water, and the legislature could not have intended that after this act was passed no proprietor of a spring in the neighborhood could use his spring without the permission of this Canal Company, and that the Canal Company could say that, although they might not want the water at one time, they might want it hereafter.

This is a claim of a monstrous description, and a claim which I am very sorry this company ever set up, and which the facts show they set up without any justification; and they have carried on this litigation with as little justification as they had in setting up the original claim. They had fallen into decay, and the necessity for the maintenance of this canal no longer existed. It is, therefore, greatly to be deplored that those having the management of the affairs of this company did not pause before they brought a case into court with regard to such a broken-down business as this is, and asked me to deprive a large district of wholesome water in order that this canal

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455] our rights. We admit *that we only felt the inconvenience in 1870, but the defendants claim a right to take this water, and, if they can do so, other persons may take

may be supplied with that as to which it is of very little importance to the public or to themselves whether it is supplied or not.

If there is any doubt upon the construction of these acts of Parliament, what conclusion ought any court or person to come to? Here are springs affording clear water, which can be turned to the use of human beings, keeping them in health and vigor, and turned to that use by this water company, for a laudable purpose, which all mankind approve; while this Canal Company, to whom it can be of little use, are to prevent the water being supplied for this purpose in order that this Canal Company may be able to carry on a navigation which does not exist, except in the fancies of those who act on behalf of the company. On broad principle, my opinion is that it never was the intention of the legislature to confer on this company greater powers than a riparian proprietor has. My opinion is, that they have not even the powers of a riparian proprietor, but that it was only intended to give them the power of taking such water as they could find within the prescribed limits which was not wanted for the other purposes to which water can be applied."

[His Honor then commented on a question depending on the construction of the acts of Parliament which it is not necessary for the purposes of this report to notice. He then observed that there had been no deficiency of water until 1870, and continued:]

Under those circumstances, was it justifiable in them, without waiting for further experience, to file this bill? Would it not have been well to have paused before entering on such a litigation, in order that they might see what the result of the next spring or summer would be? They saw that the water-works were established, not only for the benefit of the inhabitants of New and Old Swindon, but for the benefit of the Great Western Company. I take for granted that it is perfectly well known that one of the greatest stations on the Great Western Railway

is Swindon, and that the inhabitants of Swindon are principally servants of the Great Western Company, and if they wanted the water, they wanted it for a lawful and proper purpose, and one of the greatest public importance. If it was for the railway, it was that they might continue the traffic for the benefit of the public, and if it was for the use of the workmen, it was that the traffic might be continued also. Therefore it is immaterial whether the Great Western Company or the inhabitants of Swindon disconnected with the railway wanted the water. The water was wanted, and it was only because it was wanted that it was taken. There is no suggestion in the evidence that this was a wanton taking of the water for the purpose of wasting it, but it was taken because it was wanted for the greatest of all purposes—the maintenance of human beings in a state of sound health and condition. When the Canal Company saw that the water was wanted for such a purpose as that, and that, if they had it, it could only be of very little use to them, ought they not to have paused before entering into a litigation such as this? They might have paused, even if they had been in a flourishing condition; but it seems to me rather a wanton waste of the funds which they have, to enter upon such a litigation, which litigation they ought to have refrained from. There is not one particle of evidence to show that there was any deficiency of water before 1870—and this bill was filed in 1871—nor has there been any deficiency of water since 1870.

[His Honor then commented on the evidence, and said that in his opinion the quantity of water taken was absolutely insignificant, and made no appreciable difference to the navigation of the canal. So far from having been in want of water, they were in the habit of selling water to the railway company. The only case cited which had any semblance to the present case was *Medway Company v. Earl of Romney* (9 C. B. (N.S.), 575), but that did not apply, because in this case the water was not vested in the Canal Company.

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other streams, and the canal will be left without *water. [456 There is no occasion for us to prove specific damage: *Bonomi v. Backhouse* ('); *Wood v. Waud* ('). As to the necessities of the inhabitants of Swindon, let them buy our rights, or go to Parliament for powers if we are unreasonable.

Mr. *Glasse*, Q.C., and Mr. *Bristowe*, Q.C., for the defendants: We have bought a mill and its rights, and we can take the water. We have done nothing which we were not entitled to do, and we have done no real injury to the plaintiffs. The sole reason of this suit is, that in consequence of the exorbitant demands of the Canal Company, the Water-works Company was formed, and the Canal Company cannot sell the water which they had never any right to sell. We are not now interfering with or injuring the canal. The Canal Company are not riparian proprietors, and have only power to use the water for the purposes of their canal, and how can that be interfered with by the rightful acts of other riparian proprietors? The plaintiffs ought not to have allowed us to make our water-works if they thought them injurious: *Rochdale Canal Company v. King* (').

Mr. *Pearson*, in reply.

SIR W. M. JAMES, L.J.: I am of opinion that the plaintiffs ought to succeed on the question of legal right which is asserted by this bill.

The plaintiffs, many years ago, obtained an act of Parliament by which they were entitled to supply this canal with water from the streams within a certain distance of their canal; among which *streams was the Wroughton [457 Stream. They, about the beginning of this century, availed themselves of their powers in respect of the Wroughton Stream, and in order to get the water from that stream they acquired by purchase a mill a little distance from the line of the canal, and they made, as they lawfully might, a new channel to divert the water into their canal near the middle of the summit level. They had acquired all the rights of a riparian proprietor with regard to that channel; and they

His Honor was, therefore, of opinion that the Canal Company had not the right which they claimed; that even if they had it, the abstraction by the defendants was not of such an amount as would justify the complaint; that, except in 1870, there had been no deficiency, and that the plaintiffs had no right to speculate on what might happen hereafter; that the Canal Company

had only a right to water for their canal, and could not otherwise interfere with any riparian proprietor, or with the proper and beneficial use of water in the district; and the bill must be dismissed with costs.]

(1) E. B. & E., 622.

(2) 3 Ex., 748.

(3) 2 Sim. (N.S.), 78.

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also acquired all the rights of a riparian proprietor, which up to the time of the purchase were vested in the then owner of that mill.

Now, it is the right of a riparian proprietor in this country to prevent any other riparian proprietor above him from diverting the stream so as to cause that stream to flow otherwise than in its accustomed channel; and he has a right to have the natural flow of water through his land, and into his land, and into his artificial canal, if he has had that canal for a sufficient length of time, exactly as the flow has existed during past years. All streams, however, are *publici juris*, and all the water flowing down any stream is for the common use of mankind who live on the banks of the stream; and therefore any person living on the banks of the stream has an undoubted right to the use of the water for himself, his family, and his cattle, and for all ordinary domestic purposes, such as brewing, washing and so on. Those are the common purposes of water in the ordinary mode of using water.

The defendants in this case are a water-works company who, partly from public motive and partly for private profit, have been minded to supply water to the large town of Swindon, where, by reason of the works of the railway, a large population has been gathered together. The defendants wish to use and divert water for the purpose of supplying those towns. That is not a purpose for which a riparian proprietor is entitled to take the water from its natural course; and the defendants are diverting water from the stream for a purpose which is not legal, and in a manner which is not legal. The plaintiffs, being below the defendants on the stream, have a right to say to the defendants that they must not divert the water from its natural course; and this is really the question of right for the court to decide. It has been settled that actual pecuniary damage is [458] not necessary to give a right of action *or suit, because it is sufficient to show that the defendants are interfering with that which is a right, and in a mode which may give a future legal right to interfere with the stream when it may be wanted, or may in a pecuniary point of view be useful to the riparian proprietor below. I am of opinion, notwithstanding the decision of the Vice-Chancellor, that there is a clear legal right in the Canal Company, whether as owners of the canal, or as owners of the stream diverted into the canal, to say to the defendants, "You must let the water flow down in its ordinary course." If we were now trying the question in an action at law, the jury would be directed

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by the judge to find a verdict for the plaintiffs, possibly without real damages (except so far as loss was incurred in the year 1870), but with sufficient damages to show that there was a legal right invaded, and the judge would hold that the plaintiffs were justified in having that right vindicated by the courts of this country.

Then it is said that this court will not interfere where there is no substantial damage done. In point of fact, it appears to me that in the year 1870 there was what I consider substantial damage. It may be that, from the small amount of traffic, there may not have been many barges anxious to travel along the canal during the months of September, October, November and December, 1870. Still, if the canal was reduced two feet or three feet below its proper level at the time when it was wanted for the purpose of navigation, it appears to me that that would be a serious damage to a canal. It is impossible to say how many barges might have wanted to go along the canal at that time.

Then it is said that the plaintiffs might diminish that evil by dredging; but the defendants have no right to tell the plaintiffs how and at what time they are to dredge their canal. It was not, in my opinion, an idle complaint on the part of the Canal Company when, in the year 1870, they said: "You, the defendants, are taking the water away from us so as to make our canal cease to be a canal during those months."

But the defendants not only allege that there was no damage, but they have put most distinctly and clearly on their answer a claim of right of such a kind as to make it absolutely imperative on this *court, as it seems to [459 me, to determine the question of right, and to declare the right one way or the other; and, as the matter now stands, with the bill dismissed by the Vice-Chancellor, with costs, it is an adjudication in favor of the defendants that they have the right they claim.

It is true that one of their defences is, that there has been no injury to the plaintiffs; but it appears to me that the plaintiffs are entitled to have a declaration from the court that the defendants are not at liberty to divert the water from the Wroughton Stream into their reservoir for their own purposes and profits whenever the demand on them for water requires it.

The Canal Company, however, only want water legally as a canal company for the purposes of navigation. It is true that if they have surplus water, there would be great difficulty in saying whether or not they might sell it to

other persons. That, however, is a matter as between them and the other persons who would be injured by the water being so taken; but, as far as their constitution goes, they are only entitled to take and use the water for the purposes of navigation; and the surplus must be the surplus which arises casually with regard to the water they have so taken. Therefore it would be right, in making the declaration and granting the injunction, not to grant an injunction which would enable the Canal Company to play the part of the dog in the manger, and prevent the Water-works Company from using the water at a time when the Canal Company are turning it off as waste, which it seems has been usually the case. The injunction must be limited to restrain the defendants from so diverting the water as to cause any damage or hindrance to the navigation of the canal. That is all it is necessary to do for the protection of the right to the one, not unnecessarily interfering with the objects of the other. The plaintiffs have succeeded as to their legal right: and the defendants being wrong, the plaintiffs must have the costs of the suit; but there will be no costs of the appeal.

SIR G. MELLISH, L.J.: I am of the same opinion. I think that the Canal Company, having purchased land on the banks of the stream, have the ordinary rights of riparian 460] proprietors with respect to that stream. I am also of opinion that, besides the ordinary rights of a riparian proprietor, they have, under their first act of Parliament a right to take the waters of the stream for the purpose of supplying their canal with water for navigation. I agree that they have no right to take the water of the stream for other purposes, such as for the purpose of selling it; and that, if they do so, any person lower down the stream who was prejudiced by being deprived of the water would probably have a right of action at law against them. But I think that, if they took the water into their canal really for the purposes of navigation, and then happened to have a surplus quantity of water in any particular place, it would be very difficult to say that they might not legally sell that surplus quantity. That, however, is quite immaterial for the purpose of this suit; for, although I agree they have the ordinary rights of a riparian proprietor, yet this suit is really brought in respect of their rights as canal proprietors for the purpose of supplying their canal with water.

Now the argument which has been urged upon us, and which is the real argument to be considered, is this. It is said that they are enabled to take the water for the purposes of supplying their canal with water for navigation,

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and that when this suit was brought (for that is the material time) they did not want it for that purpose, and therefore they ought to have no relief; and it is said that they could not bring an action at law for the diversion of the water, unless for the time when there had been a diversion which took away water which they wanted for navigation. If that was so, and if, instead of bringing this suit, they had brought an action in January, 1871, after the diversion of the water in November, 1870, at a time when they did want it (whether to a greater or less extent it is not necessary to consider), the action might have been maintained, even if the proposition was correct, that they could not maintain the action unless there had been a diversion of the water at the time when they wanted it for the purposes of navigation.

But that proposition is, in my opinion, not correct; for, although the Canal Company have by act of Parliament only a right to take the water for the purposes of navigation, yet, having taken it, and having legally made a junction between the stream and *their canal for the *bona fide* [461] supplying their canal with water, in my opinion they could maintain an action against the proprietor above who illegally diverted the water, notwithstanding that, at the time, they did not actually want the water for the purposes of navigation.

The test is this: Supposing the person who had so diverted the water had done so, and had used it for twenty years, could he have claimed a right? In my opinion, he clearly could. If he had kept up the diversion for twenty years, although they never wanted the water, yet, when they came to want it at the end of twenty-one years, having allowed him to divert it, their right would be lost, just the same as the right of any other landed proprietor would be lost. For the purpose, therefore, of maintaining their right they would be entitled to bring such an action.

I quite agree that this act of Parliament does not give them the entire stream. The proprietors above are not, by the diversion of the stream, deprived of the rights which they had; that is to say, all the rights of a riparian proprietor. If the population increases round the stream, and for ordinary purposes, such as a riparian proprietor is entitled to use the stream for, the stream is diverted, the company would have no remedy. The act of Parliament does not give them any property in the stream, but only a right to make a junction within 2,000 yards of their canal, and to take all they can properly obtain, subject to the rights of the proprietors and millers above to use the water for ordinary purposes. If the proprietors above afterwards seek to use

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it for purposes for which they are not entitled to use it, it appears to me that the plaintiffs have the same right that any other proprietor along the stream would have; that is to say, they have a right to use the stream for ordinary riparian purposes—a right to use it for the purpose of supplying their canal with water; and having these important rights on the stream, they are entitled to say that they will not allow a person above to acquire rights of diversion which may deprive them of the means of exercising their own rights.

It is quite plain (indeed, I do not know that it is disputed) that the diversion of the water of a stream for the purpose of sending it in large quantities to a reservoir to supply a 462] town is not within *the right of a riparian proprietor. To my mind, it follows, that at the time when this suit was brought the plaintiffs might have maintained an action at law for diversion.

Then what relief ought they to have in this court? I quite agree in the modification which the Lord Justice has proposed; and the fact that previously to bringing this suit they have sold large quantities of water, makes it more necessary that we should see that our injunction does not enable them to get water for purposes for which they are not entitled to take it. On the same principle, if they brought an action at law for the diversion of the water, though they might maintain the action, they could not allege as special damage that they had been deprived of large quantities of water which they might otherwise have sold for profit. They could not, being only entitled to the water for navigation, have recovered damages for that which prevented them from having the water for other purposes.

MINUTES: Declare that the defendants are not entitled to divert into their reservoir the waters of the Wroughton Stream. Restrain the defendants from diverting into their reservoir the waters of the several springs which unite and become the Wroughton Stream, or the waters of the said stream so as to interfere with the supply of water required by the plaintiffs for the navigation of the canal. Defendants to pay the costs.

Solicitors for the plaintiffs: Messrs. *T. White & Sons*, for Mr. *H. C. Crowdy, Highworth, Wilts.*

Solicitor for the defendants: Mr. *J. Crowdy*, for Messrs. *Townsend & Ormond, Swindon.*

The owner of land through which a stream of water runs has a legal right to the use of the water, of which he cannot be deprived without his consent, or a just compensation: *Gardner v. The Trustees, etc.*, 2 Johns. Chy., 162; *Reid v. Gifford*, Hopkins's Chy.,

416; *Brown v. Bowen*, 30 N. Y., 538; *Murclay v. Shultz*, 29 N. Y., 346.

Though the legislature has power to take private property for useful and necessary public purposes, it is bound to provide a fair compensation to the individual whose property is taken, and until

a just indemnity is afforded to the party, the power cannot be legally exercised: *Gardner v. Trustees, etc.*, 2 Johns. Chy., 162.

Where an act of the legislature authorized the trustees of a village to supply it with water, by means of conduits, and, for that purpose, to enter on the lands of other persons, to make reservoirs, and lay conduits, &c., and provided compensation for the owners of such lands, and also for the owner of the land on which the spring or source from which the water was to be conducted was situated, but made no provision for indemnifying the owners of lands through which the stream flowed, and, from such spring, had run from time immemorial, for the injury they must suffer by diverting the course of the stream from their farms; the court granted an injunction to prevent any proceeding to divert the stream, until provision was made for a just compensation to the persons who might be injured by diverting the water: *Gardner v. Trustees, etc.*, 2 Johns. Chy., 162.

In such cases the officers seeking to condemn a watercourse for a public purpose, must comply strictly with the act, or they will be restrained by injunction: *Belknap v. Belknap*, 2 Johns. Chy., 463.

See *Bellingier v. N. Y., etc.*, 28 N. Y., 42; *Coit v. Lewiston*, 84 How., 222, 36 N. Y., 214; *Pisley v. Clark*, 35 N. Y., 524; *Young v. Chicago, etc.*, 28 Wisconsin, 171; *Brown v. Cayuga, etc.*, 12 N. Y., 486.

The owner of lands may protect himself from the effect of water improperly diverted, though in so doing he be compelled to enter upon the lands of the party guilty of such diversion, and, by so protecting himself injure the party guilty of the diversion: *Packer v. Rochester, etc.*, 17 N. Y., 288; *Roberts v. Rose*, L. R., 1 Excheq., 52.

Or if a watercourse be diverted, may restore it to its natural channel at any time within twenty years: *Shields v. Arndt*, 4 New Jersey Eq. (3 Green's Chy.), 234.

An action at law will lie to recover damages for the diversion of a water course or a portion thereof from its natural channel: *Crooke v. Bragg*, 10 Wend., 260; *Arnold v. Foot*, 12 Wend., 330; Hilliard on Torts, tit. "Water-courses"; Addison on Torts, same tit.

Or if the water be unreasonably detained: *Van Hoesen v. Coventry*, 10 Barb., 518.

Though the plaintiff have no use for the water so diverted: *Crooke v. Bragg*, 10 Wend., 260.

So a court of equity will restrain the corruption of water: *Richmond, etc.*, v. *Atlantic, etc.*, 10 Rhode Island, 106; *Holman v. Boiling, etc.*, 14 New Jersey Eq., 335.

A court of equity has a concurrent jurisdiction with courts of law, in a case of private nuisance by diverting or obstructing an ancient watercourse, and may issue an injunction to prevent the interruption, though the plaintiff has not established his title at law: *Gardner v. Trustees, etc.*, 2 Johns. Chy., 162; *Reid v. Gifford*, Hopkins's Chy., 416; *Olsted v. Loomis*, 9 N. Y. Rep., 423; *Van Bergen v. Van Bergen*, 2 Johns. Chy., 272; *Eldredge v. Hill*, 2 Johns. Chy., 282; *Belknap v. Belknap*, 2 Johns. Chy., 473; *Belknap v. Trimble*, 3 Paige, 577; *Van Hoesen v. Coventry*, 10 Barb., 518; Willard's Eq., 392; Angell on Watercourses, §§ 444-567; 2 Story's Eq. Jur., § 926 et seq.; *Shields v. Arndt*, 4 New Jersey Eq. (3 Green's Chy.), 234.

Although a bill of peace will not lie until the plaintiff has established his title at law, or where the persons who controvert the right are so numerous as to render an issue, under the direction of the court, necessary to bring in all the parties concerned, and to prevent a multiplicity of suits: *Eldredge v. Hill*, 2 Johns. Chy., 282.

The true reason for the interposition of equity, in such cases is, that the remedy at law is imperfect: *Reid v. Gifford*, Hopkins's Chy., 416; *Shields v. Arndt*, 4 New Jersey Eq. (3 Green's Chy.), 234.

A court of equity has jurisdiction so to regulate the common use of the water as to preserve the rights of each owner: *Belknap v. Trimble*, 3 Paige, 577.

The complainants being several proprietors of distinct lands and of separate parts of the watercourse, have still such a community of interests in the subjects of the suit, that they may join in it: *Reid v. Gifford*, Hopkins's Chy., 416; *Eldredge v. Hill*, 2 Johns. Chy., 281; *Belknap v. Trimble*, 3 Paige, 577.

Where a temporary injunction is granted upon the bill, upon an ex-

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planatory answer *positively* denying the injury, the injunction was dissolved: *Reid v. Gifford*, Hopkins's Chy., 416; *Durant v. Elnstien*, 5 Rob., 424; *Secor v. Weed*, 7 Rob., 87; *Ely v. Lowenstien*, 9 Abb. Prac., N. S., 87.

But see Moak's note, Clarke's Chy. (ed. 1869), p. 812; Perkins's note, 1 MacNaghten & Gordon, p. 48.

See also *Shields v. Arndt*, 4 New Jersey Eq. (3 Green's Chy.), 234.

Otherwise if the denial of the bill be upon information and belief: *Durant v. Elnstien*, 5 Rob., 424; Moak's note, Clarke's Chy. (ed. 1869), p. 812.

Or if the denial be evasive or unsatisfactory: *Secor v. Weed*, 7 Rob. 67; Moak's note, Clarke's Chy. (ed. 1869), p. 812.

The court will not grant an order to abate the nuisance until the party erecting it has been heard: *Van Bergen v. Van Bergen*, 2 Johns. Chy., 372.

And a court of equity will not interfere to prevent or remove a nuisance, unless it has been erected to the annoyance of the right of another long previously enjoyed: *Van Bergen v. Van Bergen*, 2 Johns. Chy., 372.

Twenty years is a sufficient length of time, and after the owner has diverted a stream for twenty years, he cannot return it to its original channel to the prejudice of another: *Belknap v. Trimble*, 3 Paige, 871; *Smith v. Adams*, 6 Paige, 485.

An owner may change the channel of a stream upon his own land if he return it to its natural channel before it leaves his lands: *Van Hossen v. Coventry*, 10 Barb., 518.

It must be a case of strong and imperious necessity, or the right previously established at law, before the party is entitled to the aid of a court of equity: *Van Bergen v. Van Bergen*, 3 Johns. Chy., 372.

Although where there is an unlawful diversion of a stream of water from the mills and hydraulic works of a party, it is a proper case for the allowance of a preliminary injunction, as the injury if persisted in, might be irreparable. The bill must however allege facts showing the injury to be irreparable: an allegation that it is so without alleging the facts is not sufficient: *Case v. Haight*, 3 Wend., 632; *Corning v. Winslow*, 10 N. Y. Leg. Obs., 7; *Corning v. Troy*, etc., 34 Barb., 485, 2 Story's Eq. Jur., §§ 926 *et seq.*;

Shields v. Arndt, 4 New Jersey Eq. (3 Green's Chy.), 234; *Chesapeake v. Patton*, 5 West Virginia, 284.

Otherwise as to a preliminary injunction if the party may be adequately compensated in damages; as where one enters upon the lands of another and takes ice from his stream: *Marshall v. Peters*, 12 How. Prac. Rep., 218; 3 Alb. L. J., 386; *Smith v. Adams*, 6 Paige, 485; *Chesapeake, etc., v. Bobbett*, 5 West Virginia, 188; *Chesapeake, etc., v. Patton*, 5 West Virginia, 284. But see *Shields v. Arndt*, 4 New Jersey Eq. (3 Green's Chy.), 234.

But the party is entitled to a final judgment and injunction, restraining the diversion of water, however trifling the damages: *Corning v. Troy*, etc., 34 Barb., 485, 8 C. 89 Barb., 311, affirmed 40 N. Y., 221; *Hammond v. Fuller*, 1 Paige, 197.

In an action to abate a nuisance, the plaintiff must allege that he is the owner of the freehold affected by the nuisance at the time the acts complained of were committed: *Ellsworth v. Putnam*, 16 Barb., 565; 1 Abbott's Forms of Pleading, 474.

And that the defendants were tenants of the freehold of the land whereon the nuisance was erected: *Ellsworth v. Putnam*, 16 Barb., 565; 1 Abbott's Forms of Pleading, 474.

But an action will lie against one who continues a nuisance: *Hubbard v. Russell*, 24 Barb., 404.

When the plaintiff must allege notice thereof to the defendant of its existence, and a request to remove it: *Hubbard v. Russell*, 24 Barb., 404; *Brown v. Cayuga*, etc., 12 N. Y., 486; *Irvin v. Wood*, 4 Rob., 146.

The plaintiff may unite a claim for the abatement of a nuisance and for damages sustained therefrom: *Getty v. Hudson River R. R.*, 6 How., 209; 1 Abbott's Pleadings and Forms, 476.

For forms of complaints and necessary allegations in actions, relating to improper diversion of watercourses, see *Gardner v. Trustees, etc.*, 2 Johns. Chy., 163; 1 Abbott's Pleadings and Forms, 474 *et seq.*; 2 Van Sant Pl., 96, 103; *Brown v. Bowen*, 30 N. Y., 519, 538.

As to proceedings in New York by writ of nuisance and the judgment to be rendered, see 2 N. Y. Revised Statutes, 332; 2 Edm. St., 341; 1 N. Y. Prac., 99.

[Law Reports, 9 Chancery Appeals, 463.]

L.JJ., April 18, 20, 25, 1874.

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[1873 L. 100.]

Light and Air—Grant—Covenant for Quiet Enjoyment—Injunction against Breach of Covenant—Proof of Damage—Easement—Practice—Surveyor appointed by Court.

There is no difference in the right of an owner of land to the ordinary easement of light, whether it is acquired by twenty years' user or by grant from the owner of the servient tenement; and if the grant is accompanied by a covenant for quiet enjoyment of the premises, such covenant does not enlarge the right of the covenantee so as to entitle him to an injunction in equity to restrain an obstruction where the damage is not sufficient to enable him to maintain an action at law.

But it is otherwise where the right to light claimed is not the ordinary easement, but a special right created by the covenant; in which case a court of equity will grant an injunction without regard to the amount of damage.

Where the court was not satisfied from the evidence whether the wall proposed to be built by the defendant would or not be a material obstruction to the plaintiffs' lights, the court directed a temporary screen to be erected to the height of the proposed wall, and appointed a surveyor to report on the effect.

THIS was an appeal from a decree of the Master of the Rolls.

The plaintiffs were W. Leech and W. H. Dodwell, cigar manufacturers and occupiers of a warehouse and premises in St. Mary Axe, in the city of London.

The land, on which the warehouse had been recently erected, was demised to William Haynes by the Master and Wardens of the Skinners Company by an indenture of lease of the 1st of February, 1866, for a term of eighty years from the 25th of March, 1865. The premises were demised "with all lights, easements, advantages, and appurtenances whatsoever thereto belonging or in anywise appertaining; and the indenture contained a covenant by the Skinners Company with the lessee, his executors, administrators, and assigns, that the lessee, his executors, administrators, and such assigns as by the Skinners Company should be allowed, "might peaceably and quietly have, hold, use, occupy, possess, and enjoy the said premises during the said term without any let, suit, trouble, molestation, hindrance, or disturbance whatsoever of, *from, or by the said Mas- [464
ter and Wardens, their successors or assigns, or any person or persons claiming under or in trust for them or any of them."

On the 30th of August, 1868, W. Haynes, with the consent of the Skinners Company, demised the warehouse and premises, with the same general words, to the plaintiffs for

a term of twenty-one years from the 25th of December, 1868, at the rent of £557.

The principal rooms in the basement, ground floor, and first floor of the plaintiffs' warehouse were lighted by a skylight in the roof of the building. There was a large opening, or well, in the floor of the first floor and ground floor rooms which admitted the light from the skylight to the rooms below.

There were also back windows to some of the rooms on the first and second floors of the building.

The building which stood on the same site before the plaintiffs' warehouse was built, was lighted in the same way, and the light had been enjoyed uninterruptedly in that manner, for more than forty years.

The defendant, J. E. Schweder, had recently taken the piece of land adjoining the plaintiffs' warehouse under an agreement for a lease from the Skinners Company, and had commenced to erect a building, the plans of which had been approved by the company. In so doing he raised the party-wall between his premises and those of the plaintiffs above the height to which it had been built by the plaintiffs, and continued it beyond the plaintiffs' building. The plaintiffs alleged that the defendant by this wall obstructed the light coming to the skylight and back windows of the plaintiffs' warehouse, and they filed the present bill to restrain him from interfering with their ancient lights. When the bill was filed the wall complained of had been raised about fifteen feet above the original height, and the defendant proposed to raise it to the height of about fifteen feet more.

The defendant in his answer, denied that the new wall, which was to the north of the plaintiffs' skylight, in any way obstructed the light coming to the plaintiffs' skylight or back windows, and he claimed the right of erecting it as high as he pleased.

On the 5th of August, 1873, an interim injunction was granted by the Lord Chancellor (Lord Selborne), restraining [465] the *defendant from proceeding with his building till the hearing of the cause.

Both parties entered into evidence as to the effect of the new wall in obstructing the light coming to the skylight and back windows of the plaintiffs' house; but the plaintiffs failed to show that the wall, so far as it had been already constructed, caused a material obstruction. The Master of the Rolls, however, was of opinion that it was not necessary for the plaintiffs to prove substantial injury, and accordingly granted a perpetual injunction restraining the defendant

from erecting, or permitting to remain, any wall or other building which should molest, hinder, or disturb the plaintiffs in the enjoyment of all those lights belonging or in any way appertaining to their warehouse (''). From this decision the defendant appealed.

(¹) 1874. Jan. 21.

SIR G. JESSEL, M.R.: How this case would have stood if the Skinners Company had not been the owners both of the plaintiffs' warehouse and of the land on which the defendant is about building a warehouse or offices, I have no occasion to say; but on the facts as they now appear, and having regard to the circumstances to which I shall call attention, and what I consider the settled law, I am bound to grant the plaintiffs an injunction, limited in the way I will mention.

The plaintiffs are underlessees, having a lease of Mr. Haynes, who is himself the lessee of the Skinners Company of a warehouse in St. Mary Axe. The defendant has an agreement for a lease from the same Skinners Company of an adjoining piece of land, on which he is about to erect a building of considerable height and importance, and the question I have to decide is, whether the plaintiffs are entitled by injunction to restrain the defendant from carrying up the building to such a height as will disturb or molest them in the enjoyment of their rights in this warehouse which were granted to them by the lease to Haynes.

First of all I will state my view of the case, independently of the facts. In my view this case is to be tried precisely in the same way as if Haynes was plaintiff and the Skinners Company were defendants. My reason for that view is this: The plaintiffs have got under Haynes all the rights for this purpose that Haynes possessed. The defendant claims under the Skinners Company by agreement, and, as appears even from the plan to the agreement with the Skinners Company, had notice, at the time he entered into the agreement, of the tenancy of the plaintiffs; besides which he has not pleaded want of notice. The result, therefore, is, that, having obtained the land with notice of the plaintiffs' rights, he cannot in this court, whether the covenant did or did not run with the land, say that he is not as fully bound as the

original covenantors. Of course I allude to the doctrine laid down in *Tulk v. Moxhay* (2 Phil., 774) and subsequently in *Western v. MacDermott* (Law Rep., 2 Ch., 72). Assuming then that we had Haynes as plaintiff and the Skinners Company as defendants, I find that the Skinners Company have by deed, namely, by this lease, granted to Haynes this warehouse, "together with all yards, areas, ways, paths, passages, waters, watercourses, lights, easements, advantages and appurtenances whatsoever thereto belonging or in anywise appertaining," for eighty years from the 25th of March, 1865. Now it is admitted by the defendant that the warehouse of the plaintiffs is exactly in the same state now as regards lights as it was at the date of this lease on the 1st of February, 1866. There can be no question, therefore, that the Skinners Company granted to the plaintiffs all the lights which are now in the warehouse. In addition to that express grant there was a covenant which contained these words: that the lessee "shall and may peaceably and quietly have, hold, use, occupy, possess, and enjoy the said premises during the said term without any let, suit, trouble, molestation, hindrance, or disturbance whatsoever of, from, or by the said Master and Wardens, their successors and assigns, or any person or persons claiming under or in trust for them or any of them." The defendant claims under them, and therefore there is an express covenant binding on the defendant that whatever has been granted shall be enjoyed without any molestation or disturbance whatsoever. It appears to me, therefore, that the question I have to try is, whether the acts of the defendant amount to molestation or disturbance of the rights so granted to the plaintiffs, not forgetting that in the construction of this instrument I am bound to give it the construction most favorable to the plaintiffs and least favorable to the defendant, putting the defendant in the position of grantor.

466] **The Attorney-General (Sir R. Baggallay), and Mr. Dundas Gardiner, for the appellant :*

That being the position of matters, I think it is not incumbent upon me to decide whether the molestation or disturbance is of so substantial a character, or likely to become of so substantial a character, as to prevent the comfortable enjoyment of the plaintiffs' warehouse, or the proper use of it for the purposes of their business. I think I must decide whether there is any molestation or disturbance at all; but if I come to the conclusion that there is such molestation or disturbance, then, according to the law as I consider settled by the authorities I shall refer to, I am bound to grant this injunction.

Now what are the facts? It is no use to go through the long affidavits in this case, because any one looking at the plans and reading two or three of the affidavits, with the assistance of the photographs and a foot rule—all which assistance I have enjoyed—cannot come to any other conclusion than that there is some sensible and appreciable interference with the lights of the plaintiffs. There are two sets of lights interfered with. The first is a large skylight at the top of the room which seems to be used for the manufacture of cigars, and the others are the back windows, as to which the interference is purely lateral. As regards the skylight, the wall has at present been carried on for about fifteen feet above the skylight, that is, above the horizontal section where the skylight begins. It is attempted to be said that the injury is not appreciable or sensible. We have a great deal of evidence on both sides, a great deal of evidence of experts, and, as is not uncommon, the experts for the plaintiffs take one view, and the experts for the defendant take another. But I cannot help seeing that the defendant's experts, although occasionally using language which seems to imply that there is no interference whatever, rather confine their remarks to the substantiality of the interference in the sense of interfering with the plaintiffs in carrying on their business. The plaintiffs' witnesses go the whole length in the other direction, and not only assert a substantial interference with the light, but say it is so great as to interfere with the proper carrying on

of the business, so as to bring it within the cases relating to nuisance. My conclusion is that there is a sensible and appreciable interference, and that it is a case of some actual damage; but, for reasons I am going to give, it is not incumbent upon me to decide as to what is the extent of that actual damage.

As regards the back windows, I consider that even the witnesses for the defendant admit diminution of light; and, without going through the details of the evidence, it is sufficient to say that I have arrived at the conclusion that there is molestation, hindrance, and disturbance of the rights granted by the Skinners Company.

The next question is, what is the law of the court on that subject? I have been pressed by the defendant very properly (and not at all at too great a length) with considerations as regards the seriousness of the consequences to him and the public generally if I adopt the view that, without proving so great an extent of damage as would entitle the plaintiffs to damages in an ordinary case of nuisance, an injunction ought to be granted in this case. I am not at liberty to take those considerations into account. No principle can be more sacred than that a man shall be compelled to perform his contract. In all cases where a court of equity has jurisdiction to enforce the specific performance of contracts, and persons voluntarily, without any fraud, accident, or mistake, enter into contracts, the jurisdiction should be exercised. Again, if it is not distinct specific performance, but that kind of relief which is given where the contract has been substantially performed, namely, by restraining a breach of some covenant in a deed of grant or lease or other document of title by which or under which the possession is changed and enjoyed—in all those cases the court enforces, not exactly specific performance, but prevents a breach of the covenant by the party entering into the agreement in aid of the enjoyment and possession granted to the other party. That has been the course universally pursued from the earlier cases, where a farmer was prevented by injunction from taking hay or straw

As far as the actual amount of damage which has been proved *by the plaintiffs, we may conclude from the [467 judgment of the Master of the Rolls that, if this had been

off the land when he covenanted merely that all the hay and straw should be used on the land, to the more recent cases, where persons have been restrained from building on the land. The courts have uniformly adopted the principle that in all these cases an injunction will be granted, so as to make the person who has entered into the contract specifically perform it, and not break the covenant he has entered into. As was said in *Lumley v. Wagner* (1 D. M. & G., 604), the extent to which that jurisdiction has been exercised is not to be abandoned. I should be disposed to go further if I had the power, and extend the jurisdiction, in cases of specific performance, very much beyond what it has been the habit of the Court of Chancery to do.

Now how does the matter stand on the authorities as to granting injunctions in cases of covenant? It is clearly established by authority that there is sufficient to justify the court interfering if there has been a breach of the covenant. It is not for the court, but the plaintiffs, to estimate the amount of damage that arises from the injury inflicted upon them. The moment the court finds that there has been a breach of the covenant, that is an injury, and the court has no right to measure it, and no right to refuse to the plaintiff the specific performance of his contract, although his remedy is that which I have described. Upon that we are not without authority. *Tipping v. Eckerley* (2 K. & J., 270) was decided by Lord Hatherley when Vice-Chancellor, and what he says as to the law at page 278 is this: "It was admitted, and could scarcely be otherwise, that had the deed contained a covenant on the part of the defendants not to pour hot water into the brook, the question of the degree of heat would have been immaterial, the question of damages would have been one not necessary to be tried, and the court would restrain at once. The question is, whether this covenant is not identical; whether, if I demise a given portion of a given thing, and covenant for the free use and enjoyment of it in the

state in which it exists at the time of the demise, I do not covenant in effect that I will not interfere or intermeddle in any way with the state of things as then existing."

A similar point came before my predecessor in the case of *Dickenson v. Grand Junction Canal Company* (15 Beav., 260). The observations I refer to are to be found at page 270: "If it be a contract duly entered into between the parties, it is no answer to a violation of it to say, that it will not inflict any injury upon one of the contracting parties. If the plaintiffs have purchased from the company a right to preserve the waters in the rivers Bulbourne and Gade from being diverted in any other manner than as diverted at the passing of the act of 58 Geo. 3, it is no answer to them to say, that the diversion proposed will not be injurious to them, or even to prove that it may be beneficial to them. It is for them to judge whether the agreement shall be preserved, so far as they are concerned, in its integrity, or whether they shall permit it to be violated."

Those judgments appear to me to be founded on sound principle. The party entitled to the benefit of the contract must be the sole judge of the extent to which he will permit it to be violated. It is the business of the court to enforce the contract, and in such a manner as the ordinary jurisdiction of the court enables the court to enforce it.

There is another case on the subject, which, although not going so far in expression, is a good illustration of what has occurred in this case. I refer to *Western v. MacDermott*, (Law Rep., 1 Eq., 499; 2 Ch., 72). That was a case of a contract or covenant not to build. I must say, on looking at the case, and without meaning to reflect on the parties, that the conduct of the plaintiff looks rather unneighborly. All his neighbor had done was to throw out a bow window at the back of his house eight feet beyond the wall, which to a very slight extent undoubtedly interfered with the plaintiff's enjoyment of the breakfast-room on the same level. It was alleged that the projection of

a case of ordinary ancient lights, he did not think that such 468] damage had been shown *as would justify the court in interfering; but he distinguished the case on the ground that

eight feet would interfere with the light of the room. In that case (Law Rep., 1 Eq., 505) the Master of the Rolls says that that would not have been sufficient to restrain the defendant on the ground of nuisance. "This suit could not, in my opinion, have been maintained on the ground of-obscuring ancient lights." . . . "I am of opinion that the next-door neighbor could not, in ordinary circumstances, complain of this as such an injury to him as he was entitled to stop; but at the same time I am of opinion, on the evidence, that notwithstanding this, the injury done to the two houses adjoining No. 9 is substantial. In the case of the plaintiff's house, it intercepts the early rays of the sun, and it also partially obstructs the view from his window; and I have no doubt it would make his house and the house on the side less sought after than others in the row, and lower their value in the market to an appreciable extent, though I should infer from the evidence probably not to any very considerable extent." Therefore the Master of the Rolls was of opinion that it was substantial, but small; and he granted the injunction, expressly saying that he would not have granted it had there been no contract. When it went before the Lord Chancellor Chelmsford on appeal, it was put to him, that on the evidence the damage was very trifling indeed, and that the Master of the Rolls was not right in saying that there was substantial damage at all; therefore he was asked to dissolve the injunction. Though he was in favor of the appellants on the evidence that that there was no substantial damage, he would not dissolve the injunction; and he says (Law Rep., 2 Ch., 75): "The defendant, in the next place, says that, admitting the addition to his house to be a violation of the covenant, yet equity will not interfere, as the plaintiff has not sustained, nor is likely to sustain, any actual damage thereby. Whether this ground of non-interference by equity can be applicable to a case of this peculiar description may be a matter deserving of some consideration. The object of the covenant

was to prevent, for all future time, any obstruction to the view from the backs of the houses by buildings or trees above a certain height" . . . "If, then, it were necessary to wait until 'substantial injury' (to use the words of the Master of the Rolls) were sustained, that period might never arrive, although violations of the covenant might be continually occurring, and the owners of the houses would never be in a situation to invoke the interposition of this court to prevent the breach of a covenant intended solely for their benefit. But it is unnecessary to determine this question, because there is evidence, upon which the court may fairly act, that actual damage will be produced by the defendant's building diminishing the value of the plaintiff's house." That is, diminishing it to some slight extent, although not substantially. It was not for the Lord Chancellor to say, that even if no damage were proved it would do; but it was sufficient for him to say, that if damage, although not substantial, were proved, it would certainly do.

In that state of the authorities, I think it is plain that if the plaintiffs establish that they have a grant of all the lights of the house, and if the defendant is interfering with or obstructing any of the lights so as to commit a breach of the contract as to quiet enjoyment, they are entitled to the aid of this court. It was pressed upon me that such a decision would be extremely inconvenient not only to the defendant in this case, but to persons in general who build houses in rows and grant leases to persons who purchase one or more of those houses. This court has nothing to do with that. If persons are so careless or so oblivious of their interests that they choose to enter into contracts which are inconvenient to them, that is no reason why the court should not, at the instance of the other party, enforce it. It may be inconvenient and injurious to the Skinners Company that, having granted a lease with all the lights, they are not allowed to build on their adjoining land to the extent of obstructing one of

there was an express grant of lights, and also a covenant for quiet enjoyment. But there is no other *grant here [469 than the grant of the ordinary easement which is granted with a tenement, and the right in no way differs from that which may be acquired by twenty years' user. The covenant *for quiet enjoyment is only for the enjoyment of the [470 premises comprised in the grant, and does not extend the covenantee's right to light, although it gives him an additional remedy. In such a case the plaintiffs must show substantial damage before they could maintain an action at law, and there is no difference in this respect between equity and law. If the lights secured by the covenant were of a special nature, the case would be different. In that case the court might not regard the *quantum* of damage if the covenant were broken: *Ingram v. Morecroft* (1); *Booth v. Alcock* (2); *City of London Brewery Company v. Tennant* (3); *Kelk v. Pearson* (4).

*Mr. Southgate, Q.C., and Mr. Locock Webb, for the [471 plaintiffs: Our case differs from the ordinary cases of obstruction of ancient lights, because the defendant is bound by the covenant of the Skinners Company that nothing shall be done by them, or those claiming under them, to molest or obstruct the lessees in the enjoyment of the light as it existed when the grant was made to them: *Davies v. Marshall* (5). It is not, therefore, necessary for us to show what amount of light was anciently enjoyed by the owners of the land, nor to prove any material damage: it is enough that we can show an interference with the light as it existed at the time of the grant that is not merely trivial. The mere fact that there has been a breach of the covenant is sufficient ground for this court to interfere: *Tipping v. Eckersley* (6); *Back v. Stacey* (7); *Attorney-General v. Nichol* (8); *Dickenson v. Grand Junction Railway Com-*

those lights, though the use of that one is not necessary, or even perhaps desirable, for the tenant of the house to which the privilege is affixed. I have nothing whatever to do with that; I must construe the contract as I find it. The result will therefore be, that I must grant an injunction restraining the defendant from erecting or continuing any wall or other building which will molest, hinder, or disturb the enjoyment by the plaintiffs of all the lights belonging, or in anywise appertaining, to their warehouse which belonged or appertained thereto on the 1st of February, 1866, being the lights

now belonging thereto. It will be for the defendant to determine to what extent that compels him to pull down the wall already erected. To some extent I am of opinion he must pull it down. In a case of this kind the costs must follow the result.

(1) 33 Beav., 49.

(2) Law Rep., 8 Ch., 668.

(3) Ibid., 9 Ch., 212.

(4) Ibid., 6 Ch., 809.

(5) 1 Dr. & Sm., 564.

(6) 2 K. & J., 264.

(7) 2 Car. & P., 465.

(8) 16 Ves., 338.

pany (¹); *Watts v. Kelson* (²); *Piggott v. Stratton* (³); *Western v. MacDermott* (⁴). But if we are called upon to show substantial damage, the evidence is sufficient to show that, if the wall should be built to the height which the defendant threatens to build it, the light will be very materially interfered with.

At the conclusion of the argument of the counsel for the respondents, the Attorney-General offered to consent to build the wall so as not to exceed a height which he then indicated, and that the bill should be dismissed without costs, and no costs of the appeal.

SIR W. M. JAMES, L.J., said that the case might stand over for the plaintiffs to decide whether they would accept the terms offered; and if they were not willing to do so, it would be necessary to have further evidence as to the effect of continuing the wall above its present height, and for that purpose the court would direct a scaffolding or screen to be erected to the height proposed in the plans, and would ap- 472] point a surveyor to report upon *the effect of it. It was necessary, however, first to give judgment upon the point of law decided by the Master of the Rolls.

SIR G. MELLISH, L.J.: The Master of the Rolls decided this case on a question of law which is one of very considerable importance, and as we have the misfortune to differ from him on that question of law, we think it is desirable to give judgment upon that point now. It is well known that there are two ways by which at present the right to light can ordinarily be acquired. First, it can be acquired by twenty years' user or occupation of lights under the Prescription Act; and secondly, it can be acquired by what is ordinarily called the disposition of the owner of the two tenements. It is perfectly established that if a man owns a house, and owns property of any other kind adjoining that house, and then either conveys the house in fee simple or demises it for a term of years to another person, a right to light unobstructed by anything to be erected on any land which at the time belonged to the grantor passes to the grantee. I am clearly of opinion, as I have before expressed in the case of *Kelk v. Pearson* (⁵), that there is no difference in the extent of these rights. It makes no difference whatever whether a person has acquired the right to light by twenty years' user, or has acquired it by the disposition of the owner of the two tenements. In either case the extent

(¹) 15 Beav., 260.

(²) Law Rep., 6 Ch., 166.

(³) 1 D. F. & J., 33.

(⁴) Law Rep., 1 Eq., 499; 2 Ch., 72.

(⁵) Law Rep., 6 Ch., 809.

of the right is exactly the same. If the mode in which the right to light is acquired by law is considered, that will be quite clear, because before the passing of the Prescription Act almost all rights to light were ordinarily obtained by a grant express or implied. No doubt they might be claimed by prescription, but of course there were very few lights that could practically be claimed by prescription, because, in order to support a light, by prescription, the light must have existed since the time of Richard I. There were very few houses, in fact, which existed from the time of Richard I., and the lights of all other houses were, in point of law, always considered to be claimed by a lost grant, and it was always so pleaded at law. The courts of law, on the consideration of the extent of such a right, had, long before the *Prescription Act, held that it did not entitle the [473 owner to every ray of light that might happen to come through the windows, and that he could not maintain his action for the abstraction of light unless he could make out that the comfort of his house was diminished by the deprivation of light, or that he was prevented, if he was the owner of business premises, from carrying on his business in the same manner as he was accustomed to carry it on before.

That being so, in the present case the light is claimed by the disposition of the owner of two tenements. The first question we have to consider is, whether in fact any greater right than the ordinary easement is passed by the terms of the deed. Now, by the terms of the deed, the Skinners Company demise, "all that piece or parcel of ground, with the warehouses, tenements and appurtenances therein, situate and being on the west side of St. Mary Axe," &c.; and then follow general words including "all lights, easements, advantages, and appurtenances thereto belonging or in anywise appertaining." Now I am very clearly of opinion that the use of the word "lights" among the general words in that lease means nothing but the ordinary right to light, namely, that well-known easement which has been known and which has existed in the law from time immemorial. I think it is unnecessary to decide the question, which may possibly admit of some doubt, whether, from the use of the words "belonging or in anywise appertaining," the right to the light in this case passes under those words, or whether it passes merely under the grant of the house. The words "belonging or appertaining" would, strictly speaking, apply to lights legally appertaining, which these lights are not. But it may be, having regard to the situation of

these premises, which are described as being newly erected, a rather more extensive meaning would be put on the words "belonging or appertaining," and they might be held to include lights usually held and enjoyed. It appears to me unnecessary to decide that point, because under any circumstances it is clear that the right to light as against the lessors, in respect of any premises which at the date of this deed belonged to the lessors, passed to the lessee, and it is quite clear that no greater right passed, even assuming that 474] the words "lights belonging and *appertaining" did include the right to the entrance of light into all the windows then existing in the house, over the premises of the vendors; because it is quite clear that the word "lights," when used in general words in a conveyance, means the ordinary right of light as it is known and limited by the law, and no greater right.

The next question is, does the covenant for quiet enjoyment make any difference? I have no hesitation in saying that nothing can be clearer than that in a court of law the covenant for quiet enjoyment, in its plain ordinary terms, does not increase or enlarge the rights which were granted by the previous part of the conveyance. Of course it would be possible to insert in any covenant words which would increase the right of the covenantee to damages at law if his rights were violated, and would entitle him to an injunction in equity to enforce that right. For instance, it might be said in a covenant that the lessee should freely enjoy the house, with an uninterrupted view from his drawing-room windows over all the existing land of the lessor. If that were inserted, no doubt it would give a larger right than had previously been granted, and damages might be recovered at law if the lessor broke that covenant, and a court of equity would grant an injunction against the lessor if he were intending to break it, and no doubt would also grant an injunction against the person claiming under the lessor if he took with notice of the covenant. But this is not a covenant of that kind; it is simply a covenant for quiet enjoyment; and I am clearly of opinion that it does not enlarge the right in any way. It is perfectly true that the lessee is "to hold and enjoy without any suit, let, or hindrance." But what is he to hold and enjoy? "The premises." What are the premises? The things previously demised and granted. The covenant does not enlarge what is previously granted, but an additional remedy is given, namely, an action for damages if the lessee cannot get, or is deprived of that which has been previously professed to be

granted. Nothing, I apprehend, can be plainer than that at law it would not, in the least degree, enlarge what was granted. This being the grant of an easement well known to the law, the benefit of it passes with the dominant tenement, and the burthen of it passes with the *servient [475 tenement, to every person to whose occupation the dominant and servient tenements respectively come. Therefore the plaintiffs in this case, if their lights were really disturbed, being the occupiers of the dominant tenement, could bring an action at law, not an action on the covenant, but an action on the case for the disturbance of that right or easement which was so granted, and it would not make the least difference whether the right had been created by twenty years' enjoyment, or whether the right had been created by grant, express or implied. In either case he would have the same remedy.

The question we have now to decide is, whether he has a greater right in equity than at law. I must say it rather surprises me to find that it should be supposed that he has any greater right in equity. I always supposed that where a right existed at law, and a person only came into equity because the court of equity had a more convenient remedy than a court of law, which is the case where a person has a legal right to lights, there equity followed the law, and the person entitled to the right had no greater right in equity than at law. In my opinion there is a distinction between this case and those cases referred to by the Master of the Rolls, where there was no grant at law at all, but the right had merely come into existence by covenant. Where the right comes into existence by covenant, the burthen does not run at law with the servient tenement at all; but a court of equity says that a person who takes it with notice that such a covenant has been made, shall be compelled to observe it. That is the ordinary case where there is such a covenant as I before referred to, that a person shall have an uninterrupted view from his drawing-room window, because the law will not allow the owner of land to attach an unusual and unknown covenant to the land, so that a man who buys the property in the market without knowing that it is subject to any such burthen, would find that some previous owner had professed to bind all subsequent owners by an obligation not to obstruct the view which somebody else would have from the windows of his house. In such a case as that, though the man who makes the covenant is liable, yet those claiming under him are not liable at law; but the Court of Equity says that if a purchaser has taken the land

476] with notice of that contract, it is contrary to *equity that he should take advantage of that rule of law to violate the covenant. But in the case of a grant of a well-known easement, such as a right to light or a watercourse, or a right of way, or any of the numerous easements which are well known to the law, when they are once validly created the right passes at law, and the owner and occupier of the dominant tenement may maintain an action against the occupier of the servient tenement if the right is interfered with; and in all such cases the rule in equity ought to follow the law. If the legal right is not interfered with, or if such damage has not been occasioned as would sustain an action at law, then, in my opinion, there is no right in this court.

The only ground on which it could be supposed to make any difference would be this—that there are cases in which an action might be maintained at law, and yet there would not be damage sufficient for this court to interfere in granting an injunction. In such a case possibly it might be contended (though I doubt whether such an opinion would be correct) that the covenant for quiet enjoyment would be a reason why this court should grant an injunction when less damage has been occasioned than would have supported an injunction if there had been no such covenant for quiet enjoyment, and the right had been merely gained by twenty years' user. Practically, in my opinion there is no difference with respect to light in the amount of damage which would entitle a person to maintain an action at law and that which would entitle him to file a bill in equity. The circumstance that all cases of loss of light and air are brought to this court, seems tolerably good evidence that the world at large does not consider that a plaintiff has practically a better chance of succeeding if he has the right to light tried before a judge and jury than he has if he comes to this court. I am most unwilling to make a difference between law and equity when I do not find it exist.

Therefore, in my opinion, in this case the plaintiffs have the ordinary right to light, and it does not make the slightest difference whether the light was acquired by twenty years' user, or whether it has been acquired, as it has been acquired in this case, by the disposition of the owner of the two tenements. I think that nothing could be more inconvenient 477] than that there should *be two rights, one more extensive than the other, according to the manner in which they had been acquired. Whenever the servient and dominant tenements come into the occupation of the same

owner, of course the right to lights is gone, and when they are separated, it again arises by what is called the disposition of the owner of the two tenements. Whenever that takes place, whether it is a lease or an absolute conveyance, there is always, in the ordinary practice of conveyancers, a covenant for quiet enjoyment, and I cannot help thinking it would be most mischievous if it were held that a person who claims a right by an express covenant in that way under a conveyance has a greater right than a person who obtains his right to light by twenty years' user. Therefore I cannot agree with the ground upon which the Master of the Rolls has decided this case, and I am of opinion that the plaintiffs have an ordinary right to light, and no more.

SIR W. M. JAMES, L.J.: I am of the same opinion. It was to me a very startling novelty to find that the case was supposed to turn upon the covenant for quiet enjoyment. The covenant for quiet enjoyment is in the ordinary form, the form which has been in use for centuries, and in countless instruments of all kinds. I certainly never understood that it was the object or effect of a covenant for quiet enjoyment to enlarge the rights of the grantee or to increase the liabilities of the grantor. The covenant was simply a covenant that the grantee should have that which had been purported to be granted to him either expressly or by implication. I quite agree with the Lord Justice in saying that the fact that there was a covenant for quiet enjoyment in this case ought to be entirely put out of the question. I quite agree, also, it would be a source of infinite litigation, mischief, and injustice, if every landlord in this country were supposed in every lease of a dwelling-house or other property to give, by the general words or by a covenant of quiet enjoyment, to the lessee or grantee any right greater than the grantee would have by the ordinary rules of law as against a third person; always, of course, excepting the distinction that twenty years is wanted in the one case and not in the other. As I understand the terms of the grant in this case, my strong *opinion would be, if the grant is construed [478 strictly according to its legal meaning, that the express grant of lights is the grant of lights over another man's property, that it is a grant of that which had in law an existence as an easement over another man's property at the time when the grant was made. There was the grant of the property, and there was the grant of this thing belonging to it, and which appertained to it in respect of some other person's estate. In my opinion the grant of those lights as there expressed only deals with that same thing

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(whichever way it is construed) which has been given by the grant of the house itself to the lessee. There is, moreover, no reason for giving more than the actual legal meaning to the words. The conveyance of the property, as between the owner and the grantee of the property itself, would give him *de facto* the enjoyment of everything which could be enjoyed in the nature of an easement against a third person. I think, further, that the right to lights means the very same thing as is expressed in the Prescription Act (2 & 3 Will. 4, c. 71, s. 3) by the words "access and use of light to and for every dwelling-house, workshop, or other buildings." If the words in the grant had been, "together with the access and use of light to and for the said dwelling to the existing windows," it would have had exactly the same effect as the word "lights" here, and those words, if inserted in the deed, would have the same effect as the words in the act, and as the supposed words in the lost grant in the old cases.

I quite agree with the Lord Justice that this question is to be tried on exactly the same principles as if it were a suit against a neighbor, on the assumption that the lights were of sufficient antiquity. Therefore the question must now be put in train for further inquiry, and for further argument as to costs, in case the parties do not agree.

Solicitors for the plaintiffs: Messrs. *Lumley & Lumley*.

Solicitors for the defendant: Messrs. *Travers, Smith & Co.*

[Law Reports, 9 Chancery Appeals, 483.]

L. JJ., March 18, 1874.

483] *COMMERCIAL UNION ASSURANCE COMPANY V. LISTER.

[1874 C. 85.]

Insurance—Damages—Action—Indemnity—Subrogation.

The owner of a building insured it against fire, but not to the full value. The building was burnt by what was said to be the negligence of the servants of a municipal corporation; and the owner brought an action for damages against the corporation:

Held (affirming the order of the Master of the Rolls), that the owner undertaking to sue for the whole amount of damage, would be allowed to conduct the action without the interference of the insurers, but would be subject to liability for anything done by him in violation of any equitable duty towards the insurers.

S. C. LISTER, the defendant in this case, was a silk spinner at Halifax, and had there a large mill called Wellington Mill. On the 4th of December, 1873, an explosion of gas occurred in the Wellington Mill, which, with its contents, was thereby destroyed. The explosion was said to have

been occasioned by the negligence of the servants of the corporation of Halifax, by whom the gas was supplied. The mill was insured in eleven fire insurance offices for sums amounting to £33,000. Mr. Lister estimated his damage at £56,000, of which £8,000 was for consequential loss of profits, and this of course would not be in any way covered by the insurances. Mr. Lister had commenced an action against the corporation for the amount of his damage, and the eleven insurance offices filed the bill in this suit, praying for a declaration that they were entitled to the benefit of any right of action vested in the defendant; and that the defendant might be restrained from prosecuting his action otherwise than for the whole amount of damage; and might be restrained from refusing to allow the plaintiffs to use his name for the purpose of any proceedings against the corporation.

The plaintiffs moved before the Master of the Rolls for an injunction according to the prayer of the bill, and the defendant by his counsel undertaking to sue the corporation for the whole *amount of loss occasioned by the explo- [484 sion, and in any compromise not to take into consideration his liability as a ratepayer of Halifax, his honor did not think fit to make any order for the motion except that the costs should be costs in the cause (').

(¹) 1874. Feb. 19.

SIR G. JESSEL, M.R.: The point is really very simple. The defendant insured his mill against fire with a great many insurance companies, and the mill was burnt. The total amount of the loss is admitted to exceed very largely the total amount of the insurances. It is alleged that the fire was caused, not by any act of the person assured, but by the act of the corporation of Halifax, or their servants, whose carelessness is alleged to have been the cause of the fire, and that the carelessness was of such a kind as to render the corporation liable for the whole of the loss. In that state of things the insurance company or companies is or are willing to pay the amount of the insurance, and they say that, having paid that amount (they pay of course by way of indemnity), if the assured obtains from the corporation of Halifax a sum larger than the difference between the amount of the insurance and the amount of the loss, he is a trustee for that excess for the insurance company or companies—a proposition which I take to be indisputable.

But then they want to go further, and they assert that in such a case the insured person, though entitled to bring an action for the loss he has sustained, is not entitled to be master of that action; and they assert that, though he is bringing it *bona fide*, and is acting *bona fide*, he is not entitled to compromise that action, or to do anything else, without their assent.

I can find no ground whatever for such a suggestion. He is entitled to bring an action against the corporation for the injury to himself. He is entitled, and is bound, and has agreed, as there is one cause of action, to bring the action for the whole loss to himself, including that part of the loss against which he is indemnified by the insurance companies; and he is not entitled to compromise that action otherwise than *bona fide*.

Another objection was taken on a small point, that he was a ratepayer of Halifax, the town which would be ultimately liable to make good the loss if the action results adversely to the corporation, and that he would have re-

485] *The plaintiffs appealed.

Mr. *Cotton*, Q.C., and Mr. *Cohen*, Q.C., (Mr. *Kekewich*, with them), for the plaintiffs:

If the companies had to pay the whole of the loss, it is clear that they would be entitled to compel the defendant to allow them to use his name in the action, and that they would have the sole conduct of the action, or in other words, would have a right of subrogation. If the defendant recovers the whole damage the companies will have nothing to pay: *Yates v. Whyte*, ('); but if the corporation submit to pay the excess of the damage over the amount of the insurances, the defendant will of course accept that compromise, and will have no inducement to prosecute the action for the full amount, as the companies would pay the difference. The court should therefore interfere: *Randal v. Cockran* ('); *Dickinson v. Jardine* ('). It is absurd to say that if the insurance is for £1,000, and the damage is £1,001, then the insurers have it all in their own hands; but if the damage is £999, then the insured has it all in his hands, and they have nothing to do with the proceedings. It is very analogous to the case of principal and surety, when the surety has had to pay.

Mr. *Fry*, Q.C., and Mr. *Tapping* (Mr. *Graham Hastings* with them), on behalf of the defendant, contended that there was no right of subrogation, the contract of the insurance companies being one of indemnity. Until the defendant has been paid his whole loss he is in no sense a trustee for the companies. Why is the person principally interested not to have the conduct of the litigation? How can the fact of his having insured deprive him of his right to sue the corporation? Subrogation only arises when the whole damage has been paid: *Pothier* on Obligations, by *Evans* ('); *Pothier*, Ed. *Dupin* ('). Until the insured is paid the whole of his loss he remains *dominus litis*: and if the plaintiffs think

gard to that fact in making the compromise. It is sufficient for me to say now that he is willing to undertake not to have regard to that fact, and therefore it is not necessary to discuss the question as to how far that compromise would be *bona fide*, even if he had regard to that.

Then, that being so, it appears to me that, on these undertakings being given, it would not be right to make any order on this motion. Following a rule laid down by Vice-Chancellor Kindersley, that on an interlocutory application the court ought not to intimate, further

than is absolutely necessary to decide upon the application to the court, the opinion of the judge on the merits of the question, I abstain from saying anything more. Upon that undertaking being given, I think there should be no further order, and that the costs of this motion should be costs in the cause.

(1) 4 Bing. (N.C.), 272.

(2) 1 Ves. Sen., 98.

(3) Law Rep., 3 C. P., 639.

(4) Page, 160.

(5) Vol. x., p. 845.

they can recover the whole damage, let them pay the whole to the defendant.

*Mr. *Cohen*, in reply: The insurance companies [486 cannot sue in their own name, and are entitled to use that of the insured. We say that it is the duty of the defendant to recover the largest sum possible; but it is obviously not his interest to run the risks of litigation for that purpose if he can by compromise obtain what he wants.

SIR W. M. JAMES, L.J.: In this case the Master of the Rolls has put the defendant under an undertaking to sue for the whole amount, and does not put him upon any other undertaking except that he is not to compromise with reference to his position as a ratepayer. The Master of the Rolls has, I understand, pronounced no decision and expressed no opinion as to what the undertaking would bind the defendant to do. The defendant has undertaken to sue for the whole amount; which means that he must sue for the whole amount whatever that amount may be. If I were to put him under any restriction about compromising, or anything of that kind, it would be determining the whole case, and deciding that he is a trustee for the insurance companies. That, however, is a matter not to be determined on this interlocutory application, and I cannot now say that he is a trustee in such a way that he is to be deprived of his own free action with respect to a matter in which he is personally and very largely interested. Then the Master of the Rolls, in the course of his judgment, threw out an observation that if the defendant compromises, he must compromise *bona fide*; but what that is the Master of the Rolls has not determined, and I do not determine. Mr. Lister is by this order left free to go on with and to conduct this action. If he does anything in the conduct of the action inconsistent with his duty, whatever that duty may be (which will have to be determined at the hearing of the cause), he will have to make good any loss thereby incurred. If he does nothing else but that which he is clearly entitled to do, having regard to the position he is in, and to the position of the other parties, then he will be liable to nothing. At present he is himself *dominus litis*, subject to a liability to answer in this court for anything which, *upon the hearing of the [487 cause should be shown to be a breach of some equitable obligation or a violation of some equitable duty which has been cast upon him by reason of the circumstances of the case. Upon this I do not at present intend to express any opinion, and I shall leave it exactly where the Master of the Rolls has left it, as a matter to be determined at the hearing

of the cause, if it should ever arise. But I agree that the undertaking not to compromise with regard to his position as a ratepayer ought not to remain. It seems to me almost idle to make such a provision, but I am told that nobody objected to it below, and that it was accordingly introduced. I understand that the plaintiffs do not wish that part to be continued, and I shall strike the words out, but that will not affect the question of costs. With that exception I shall make no order upon this motion, except that the appellants pay the costs of the appeal.

Solicitors for the plaintiffs: Messrs. *Dawes & Sons*.

Solicitors for the defendant: Messrs. *Speechly & Chamberlain*.

A carrier, when sued for a neglect to deliver goods delivered to him as such, cannot show, either as a defence or in mitigation of damages, that the owner or consignee has received the value of the property or a portion thereof upon a policy of insurance existing at the time of the loss or detention of the property: *Merrick v. Brainerd*, 38 Barb., 574; *S. P., Law v. London, etc.*, 1 Kay & Johnson, 223; see *Hutchinson v. Wright*, 25 Beavan, 444.

So such a payment is no defence to a wrong-doer: *Hayward v. Cain*, 105 Mass., 218; *Clarke v. Wilson*, 103 Mass., 219; *Harding v. Town, etc.*, 43 Verm., 586, 5 Am. Rep., 304; *Weber v. Morris, etc.*, 86 New Jersey Law Rep., 213.

If the insurers pay the amount of their insurance they may, on indemnifying the insured, prosecute the wrong-doer in the name of the insured: *Hart v. Western R. R. Company*, 13 Metc., 99; *S. C.*, 1 Code Rep., 78; *Weber v. Morris, etc.*, 86 New Jersey Law Rep., 215-6; *Home Ins. Co. v. Western Trans. Co.*, 33 How., 102.

If the insured recover a portion of his loss of a wrong-doer, he can only recover of the insurer the balance of such loss, after deducting costs and expenses: *Newcomb v. Cincinnati, etc.*, 22 Ohio St. Rep., 882.

But payment to a creditor by an assurance company of the amount of the policy on the life of the debtor, is not *pro tanto* a satisfaction of the debt of the latter: *Humphrey v. Arabin, Lloyd & Gould* (temp. Plunkett), 818.

The converse, that payment of the debt by the executors of the debtor operated to discharge the insurer, was at one time held (*Goodeall v. Boldero*, 9 East, 72), but the case has since been disapproved: *Gaggin v. Upton*, Drury's Select Cases (temp. Napier), 427; *Bell v. Aherne*, 12 Irish Eq., 576.

Where the premiums of a policy payable to the creditor are paid by the debtor, his executors, on payment of the debt, are entitled to an assignment of the policy, and to be subrogated to the rights of the creditor thereunder: *Matter of Storie's Trusts*, 1 Giffard, 94.

Where a ship, destroyed by a wrong-doer, was valued at six thousand pounds, and insured for that amount, held that on recovery by the owner of five thousand pounds against such wrong-doer the insurers were entitled to the entire recovery, although the owner claimed the ship was worth nine thousand pounds: *North, etc., v. Armstrong*, 5 Q. B., 244.

Where a policy, payable in case of loss to the creditor, was paid for by the debtor, who subsequently declined to pay the subsequent premiums, and they were paid by the creditor, held, nevertheless, that in case of death the debtor's representatives on payment of the debt, and such subsequent premiums were entitled to the policy or its avails: *Drysdale v. Piggott*, 8 De Gex, Mac-Naghten & Gordon, 546 (reversing 22 Beav., 238), and authorities cited by Mr. Perkins in note to Am. ed.

EQUITY CASES

(INCLUDING BANKRUPTCY CASES)

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS

AND THE

CHIEF JUDGE IN BANKRUPTCY.

[Law Reports, 17 Equity Cases, 345.]

M.R., January 31, 1874.

**In re* GOODWIN'S TRUST.

[345]

Will—Gift to Unborn Illegitimate Children of Testator—Marriage with Deceased Wife's Sister.

A gift by a testator or testatrix to his or her unborn child by a particular person, not being the wife or husband of the testator or testatrix, is good, provided the child has acquired the reputation of being such before the death of the testator or testatrix.

Where, therefore, a testatrix who had gone through the ceremony of marriage with P., the husband of her deceased sister, bequeathed her residuary estate upon trust for all her children by P., and died eight years after the date of the will, leaving two children, one of whom was born at the date of the will, and the other only a few weeks before the death of the testatrix:

Held, that the second child, having before the death of the testatrix acquired the reputation of being her child by P., was entitled to share in the estate.

In December, 1849, Richard Perkins went through the ceremony of marriage with Mary Goodwin, his deceased wife's sister.

On the 15th of July, 1850, Mary Goodwin made her will, by which she bequeathed her residuary personal estate upon trust for Richard Perkins during his life, and after his decease upon trust to pay and divide the trust premises unto and equally between and amongst all and every her children and child by the said Richard Perkins, share and share alike, to be vested interests in sons at twenty-one and in daughters at that age or on marriage.

Mary Goodwin died on the 1st of May, 1860. She had issue four children, viz., John Goodwin Perkins, the peti-

tioner, who was born on the 15th of June, 1850; William Harry Perkins, who was born on the 25th of March, 1860; and two other sons who died in infancy.

It appeared that the birth of William Harry Perkins was registered by Richard Perkins on the 26th of April, 1860, and in the certificate of such registration the child was described as the son of Richard Perkins and Mary Perkins, late Goodwin.

Part of Mary Goodwin's estate having been paid into court under the Trustee Relief Act, a petition was now presented 346] by *John Goodwin Perkins, praying that the fund might be paid out on the joint receipt of himself and Richard Perkins.

Mr. *Heath*, for the petitioner submitted that William Harry Perkins was not entitled to any share of the fund, referring to the *dicta* in *Hill v. Crook* ⁽¹⁾ as showing that a gift to a general class of after-born illegitimate children could not be supported. The decision in *Occleston v. Frullalove* ⁽²⁾ was distinguishable: first, because the gift there was to "reputed children;" and secondly, because the child there held to be entitled was *en ventre* at the date of the will; here William Harry Perkins was not born until eight years after the date of the will.

Mr. *W. W. Karlake*, Mr. *Langley*, and Mr. *W. Pearson*, for respondents.

SIR G. JESSEL, M.R.: The principle of the decision in *Occleston v. Frullalove*, as I understand it, is this, that a gift by a testator or testatrix to one of his or her children by a particular person is perfectly good if the child has acquired the reputation of being such child as described in the will before the death of the testator or testatrix. If so, this case falls clearly within it. The certificate shows that before the death of Mary Goodwin, William Harry Perkins had acquired the reputation of being her child by Richard Perkins, consequently the petitioner is only entitled to have half of the fund paid out of court.

Solicitors: Messrs. *Hawks, Willmott & Stokes*; Mr. *Mander*, agent for Messrs. *Miles, Gregory & Bouskell, Leicester*.

⁽¹⁾ Law Rep., 6 H. L., 265.

⁽²⁾ Law Rep., 9 Ch., 147.

[Law Reports, 17 Equity Cases, 351.]

M.R., Jan. 20, 21, 1874.

*FORSTER V. ABRAHAM.

[351]

[1873 F. 321.]

Will—Power of Sale—Power to appoint New Trustees—Appointment of Tenant for Life—Title—Vendor and Purchaser.

Testator devised his real estate to trustees, in trust for his wife for life, with remainder to F. for life, with remainders over, and with a power of sale, at the discretion of the trustees or trustee for the time being, and with the usual power for the surviving or acting trustee or trustees, with the consent of the tenant for life, to appoint new trustees. The sole acting trustee appointed the testator's widow and F. new trustees jointly with himself. F. being sole surviving trustee contracted for the sale of part of the property:

Held, that the power to appoint new trustees had been well exercised, there being nothing in the will to prevent the appointment of a tenant for life as trustee; and that F. could make a good title to the property, which the court would enforce upon a purchaser.

THIS was a demurrer to a bill filed by a vendor for specific performance of a contract for sale of certain real estate.

Charles Smith Forster, who died in 1850, by his will, made in 1847, devised all his real estate (which included a moiety of the lands contracted to be sold) unto and to the use of his brother John Forster, Charles Emery, Philip Pratt, and George Stubbs, their heirs and assigns, upon trust to pay to his wife, Elizabeth Forster, the rents thereof for her life, and after her decease to pay the same to his only son, the plaintiff, for his life, and after the plaintiff's decease on certain trusts for the plaintiff's issue and on other trusts. And it was thereby declared that, in the discretion and of the proper authority of the trustees or trustee for the time being of his said will, all or any part of the hereditaments so devised by him should or might be absolutely sold. And the testator bequeathed the residue of his personal estate to the same trustees upon trust to invest the same at interest, and to pay to his wife the dividends and income thereof during her life, and after her decease upon the trusts therein mentioned. And the testator appointed his wife and the plaintiff and the said Philip Pratt and George Stubbs his executors (but revoked the appointment of Pratt and Stubbs by *a sub- [352 sequent codicil). And it was by the said will provided that if the said trustees, or any of them, should die in his lifetime, or should at his decease decline to accept, or become incapable of accepting the trusts therein contained, or if the said trustees, or any of them, or any future trustee or trustees to

be appointed under that provision in their place, should at any time after his decease die, or desire to be discharged from, or neglect, or refuse, or become incapable to act in the trusts of the will, it should be lawful for the surviving or acting trustee or trustees for the time being of the will, or the executors or administrators of the last surviving or acting trustee, with the consent of the person or persons who should for the time being be entitled to the rents of the said real estates, and the income of the said trust moneys and his personal estate, if adult, otherwise at the discretion of such trustee or trustees, or the executors or administrators of the last surviving or acting trustee, to nominate a fit person or persons to succeed the trustee or trustees respectively so dying, desiring to be discharged, or refusing, neglecting, or becoming incapable to act as aforesaid; and providing that the trust estate should be conveyed to such new trustees jointly with the surviving trustee, or solely; and that every such new trustee should have the same powers as if he had been appointed a trustee by the said will.

John Forster, Philip Pratt, and George Stubbs disclaimed by deed the devises and trusts of the will.

By an indenture of the 1st of January, 1852, and made between Charles Emery, of the first part, Elizabeth Forster, of the second part, and Samuel Wilkinson, of the third part, after reciting that the said Charles Emery, as the sole acting trustee of the said will, in exercise of the power reserved to him in that behalf, had at the request of Elizabeth Forster (being the person then entitled to the income of the estate) agreed to appoint the said Elizabeth Forster and the plaintiff to be trustees of the will to succeed John Forster, Philip Pratt, and George Stubbs, it was witnessed that Charles Emery, by virtue of the said power, with the consent of Elizabeth Forster, appointed the said Elizabeth Forster and the plaintiff to be trustees in the place of the said John Forster, Philip Pratt, and George Stubbs, for all the trusts, and with all the powers contained in the will; and that he conveyed all the hereditaments vested in 353] *him as such acting trustee of the will to the said Elizabeth Forster and the plaintiff to the use of the said Charles Emery, Elizabeth Forster, and the plaintiff in fee, upon and for the trusts and purposes, and with and subject to the powers, provisions, and declarations in the will contained.

Charles Emery died in 1864; Elizabeth Forster died in 1869, and no other trustee of the will had been appointed.

In 1873 the plaintiff, acting as surviving trustee of the will, as well as in his own right, contracted with the defen-

dant for the sale of certain lands, one moiety of which formed part of the trust estate of the testator, and the other moiety belonged to the plaintiff.

The defendant objected to complete the purchase on the ground that the appointment of the plaintiff to be a trustee of the will was invalid, regard being had to his position as tenant for life under the will, and that, therefore, the plaintiff had no power to sell the premises.

The plaintiff filed his bill for specific performance, and the question of the validity of the plaintiff's appointment as trustee was raised by demurrer.

Mr. *Fry*, Q.C., and Mr. *Beale*, for the defendant, in support of the demurrer: The question in this case is, whether it was competent for the sole acting trustee of the will to appoint two successive tenants for life, namely, the testator's widow and the plaintiff, as trustees of the devised estates. We contend that it was not; for in the case of trustees with a power of sale it is not allowable in appointing new trustees to appoint a tenant for life in possession to be such new trustee.

Here it was not competent to the acting trustee in the appointment of new trustees to look merely to the interest of the tenants for life, yet the appointment in question might not have been for the benefit of those entitled in remainder. Moreover, the court when appointing new trustees is always jealous of appointing a tenant for life. In this case the scope of the will indicates an intention on the part of the testator that the tenants for life under the will should not be appointed trustees.

*In the case of *In re Tempest* (1) the principle was laid [354 down, that the court in appointing a new trustee will have regard to the wishes of the author of the trust as may be deduced from the instrument; and also that the court will not appoint a person with a view to the interest of some of the *cestuis que trust*.

We submit that the power was not properly exercised by the appointment of the plaintiff as trustee, and that, therefore, he cannot make a title to the property.

Mr. *Southgate*, Q.C., and Mr. *Bagshawe*, for the plaintiff, were not called on.

SIR G. JESSEL, M.R.: I will not trouble you, Mr. *Southgate*. I take it that it is the duty of the court in all these cases to give an opinion whether the title is good or bad.

This is a pure question of law, and, therefore, following the decision of the Appeal Court in *Alexander v. Mills* (2), I decide that the title is not doubtful, but that it is good.

(1) Law Rep., 1 Ch., 485

(2) Law Rep., 4 Ch., 124.

It is not disputed that the appointment was warranted by the express terms of the power ; but it is said that it was a bad appointment on one or both of the two grounds which I am going to mention. First of all it is said that in the case of trustees with a power of sale it is not allowable to appoint the tenant for life in possession as one of the trustees of the power of sale. I am not aware of any authority for any such proposition, nor do I think the proposition founded either in reason or in the practice of conveyancers. Under the old form of settlement, the common form (with which I am by no means unfamiliar) was not to vest the power of sale, strictly so called, in trustees, but to vest it in the trustees in this way : it was a power and direction to the trustees to sell at the request of the tenant for life. The result, therefore, was in fact to give the power to the tenant for life, and the only use of putting in the trustees was to secure the due application of the purchase-money. I know that now the more common form is to give it to the trustees with the consent of the tenant for life ; but the older form is still sometimes in use. Therefore this supposed disability 355] *imposed on the tenant for life, as to determining the time of sale, on the ground that his interest might be conflicting, has no existence according to usage. Of course in questions of this kind, as regards the mode of settlement of the real estate, this must weigh very much with the court. It has not been considered that there has been any impropriety or conflict of interest, as regards the time of sale or the necessity for a sale, between the position of the tenant for life and the position of the other parties claiming under the settlement.

Is there then any objection in reason ? I think not. It is quite true that now and then the tenant for life may require a sale for the purpose of increasing his income ; but that is a very rare case. As a general rule there is no one more anxious than the tenant for life to keep the estate unsold, and there is no one more likely than the tenant for life to take care that it is sold on a proper occasion, and when it will realize the highest possible price. If my opinion were asked on the reason of the thing, I should say that on the whole the tenant for life is the person most likely to be the best judge.

I am now going to the next point which I have alluded to, that is as to practice and usage. According to my experience, which, I am sorry to say, is not very short, the practice is for the tenant for life to sell the estate, and to enter into the contract for sale, and then to apply afterwards to

the trustees to join. In reality, therefore, the trustees do not determine the time of sale. I have known many cases in which the actual contract has been signed by the tenant for life before any communication whatever was made to the trustees. No doubt the more usual and the more polite course is, when arrangements have been made, or are contemplated, for the sale of an estate, to inform the trustees before everything is finally settled ; but, as a rule, the initiation of the sale, according to my experience, proceeds from the tenant for life.

Looking, then, both to the reason of the thing, and to the practice and usage of conveyancers, I see no reasonable ground for saying that the appointment of the tenant for life *per se* is improper. I find also that although, as a rule, the Court of Chancery exercises its discretion in the appointment of new trustees—a discretion I may say as regards which I respectfully wish to express *my cordial assent [356 to what fell from Lord Justice Turner in the case of *In re Tempest* (1)—yet it is not an arbitrary discretion, but to be applied according to settled rules. Then exercising that discretion, as I said before, the general rule is that the Court of Chancery will not appoint the tenant for life, although it may do so, and sometimes has done so. Therefore there is no insuperable objection to the tenant for life *per se*, that is, nothing to make the appointment invalid.

The other ground is this, that even assuming that to be the general rule, yet there are in this case indications in the will that the testator did not wish the tenant for life to be appointed. I think that is not made out; that is to say, there are no indications of a binding character, because the mere intimation of a wish, if it were not made so far a part of the will as to be binding, would be useless.

On this point I was referred to the case of *In re Tempest*, which does not appear to me to have any direct bearing upon it. That was an appointment by the court; the court thought that, though not bound by an intimation of the kind to be found in the will, it would be proper to have regard to it; but the very form of the judgment in that case shows that it was not binding on the court. The court might have appointed the gentleman named; it did not choose to do so; it held its hand on account of this indication of intention, showing most clearly that if the appointment had been made by the court it would have been valid. It was not under the notion that the appointment if made would be invalid; but it was, that, there being a discretion

(1) Law Rep., 1 Ch., 485.

to be exercised, it was for the court to look at any indications expressed of a wish on the part of the testator, to guide the court in the exercise of its discretion. Of course, if the testator had given definite instructions in his will, those would have amounted to declarations of intention, which the court could not have disregarded, because they would have been a part of the will itself. Therefore, when we come to consider the case of *In re Tempest*, it is rather an authority against this demurrer than in favor of it.

Is there, then, anything on the face of this will which shows that distrust of the tenants for life which was indicated, 357] or which *the court decided to be indicated, in the case of *In re Tempest*?⁽¹⁾ So far from that I find the greatest trust and confidence reposed in the tenants for life in this case. The tenants for life are made executors, and have the control of the investment of the personal estate, showing the confidence placed in them by the testator. It is difficult to say that that is not strong evidence that they might be trusted with the sale of his real estates, or the application of the moneys to be produced from the sale.

The next point is this: There is a power to appoint new trustees. I find the consent of the successive tenants for life is absolutely required for the exercise of that power. Here, again, the testator has trusted the tenants for life to act as trustees independently of their beneficial interest, and he has considered that the last surviving trustee and the tenant for life are the persons who are to select the new trustees. Therefore I can find no evidence in this will of any distrust or want of confidence on the part of the testator, and that was the ground in *In re Tempest*. I am strongly of opinion that the court thought there was an anxious desire to exclude the gentleman who was the nominee in that case. I can find nothing more here than the fact that the tenants for life were not appointed trustees in the first instance, which by no means shows that they were incapable of being appointed; on the contrary, the power is to appoint "any fit persons," which means persons individually fit.

I am of opinion, therefore, that there is really nothing special in this will at all to induce the court, assuming the general rule to be as I have stated, to exclude these tenants for life. I think, therefore, that the argument on both these grounds fails. Although I do not say that the court would have made this appointment, yet, it having been made under a power in the will, which I think was properly

(1) Law Rep., 1 Ch., 485.

exercisable and properly exercised, I am of opinion that it is a good title. Therefore the demurrer must be overruled, and, of course, with the usual consequences.

Solicitors: Messrs. *Beale, Marigold & Beale*; Messrs. *Pearce & Son*, agents for Messrs. *Wilkinson & Gillespie, Walsall*.

[Law Reports, 17 Equity Cases, 358.]

M. R., Dec. 11, 12, 1873.

*LORD ABINGER V. ASHTON.

[358

[1872 A. 15.]

Lease of Coal Mines—Covenant by Lessees—Mode of Working—Working Seams in consecutive Order—Evidence of Custom—Bill for Injunction.

By a lease of collieries in Cheshire, certain pits or mines, comprising the T. mine, which was the uppermost, the B. mine, which was the next, and the C. mine, which was the lowest, were, with other higher and intervening mines, demised to lessees with power to work and get coal from the same at a fixed rent, and with a covenant that they should work and carry on the mines with their utmost skill and ability, in the best and most effectual manner, to the best advantage, and according to the common mode and usual practice of carrying on coal works or collieries with effect.

On a bill by the lessor, alleging that the defendants, after having for some time worked the said three mines, had ceased working the T. mine, and also that they were working the C. mine in advance of the B. mine, and praying injunctions accordingly:

Held, that, under the terms of the covenant, the defendants were entitled to work any of the mines without working all, or all that they had commenced to work; that, according to the evidence before the court, it was the common practice in the district to work a lower seam of coal before working a higher; that there was no ground for saying that the defendants were committing a breach of the covenant; and the bill was dismissed with costs.

THIS was a suit by the owners of an estate in Dukinfield and Newton, in the county of Chester, under which certain coal mines were situated, against the lessees of the said mines, to restrain them from further digging any coal or carrying on any workings in one of the mines, called the Cannel Mine, until they had carried on the workings in another mine, called the Black Mine, to the same point to which the working of the first-named mine had been extended, and also restrain them from working the Black and Cannel Mines without working the Town Lane Mine.

The mines or beds of coal and cannel in question in the suit consisted (besides many others which had never been worked) of the Town Lane Mine, which was the uppermost, the Black Mine, which was the next, and the Cannel Mine, which was the lowest of the three which had been worked.

Before the date of his lease to the defendants, the lessor,

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Francis Astley, had sunk a pit called Astley's New Pit, and 359] by means of it *had gotten portions of the Town Lane Mine, and had begun to work it; he had also driven out roads and airways, or air gates, from the pit on the north and south sides to the boundary of the Town Lane Mine, and had worked back from that furthest extremity on the north side, and gotten the Town Lane Mine or seam of coal, working backwards on the north side, and was preparing to work on the south side, and had also placed machinery in the pit for the purpose of working it.

By the lease of the 15th of November, 1856, made between Francis Astley of the one part, and the defendants of the other part, Astley demised to the lessees "all such parts and portions, or so much and such part of all those several mines, delphas, veins, and beds of coal and cannel lying and being under the lands and grounds of Francis Astley as were not then leased, and called the Black Mine, the Town Lane Mine, and the Peacock Mine, and all other mines of coal and cannel lying between the Great and Roger Mines and the Peacock Mine (with certain exceptions), and also the pit called 'Astley's New Pit,' " with its steam engines and buildings, and all the machinery therein mentioned, with the power to get the same mines, and to make and sink any pits, and drive any tunnels or trenches, and to make any canals, watercourses, and fences, and to set up any engines or machinery therein mentioned: To hold the demised premises for twenty-three years at the rents and quarterages thereafter mentioned in particular for the pit called Astley's New Pit, in addition to the quarterages, the yearly rent of £3,000, payable quarterly, the first payment to be a quarter after the lessees should, by sinking Astley's New Pit 300 yards below the present depth, pursuant to a covenant for that purpose thereafter contained, had arrived at the mine of coal called the Black Mine, and until that time £250 only quarterly.

The lease also contained provisions for working the mines, for using the roads for the purpose of carting away the produce of the mines, and also a covenant by the lessees "that they shall and will at all times during the term, work, use, manage, and carry on the said mines thereby demised with their utmost care and ability, and with a competent number of workmen, and in the best and most effectual manner, to 360] the best advantage, and *according to the common mode and usual practice of carrying on all coal works or collieries with effect, and according to the true intent and meaning of these presents; and that no coal or cannel coal

shall be riddled at the bottom of the coal pits, or either or any of them, but that all the coal, cannel, and slack shall be gotten or brought up from the said mines; the coal and cannel hereby demised, and each and every of them shall be free and honestly gotten or brought up out of all the coal pits then open, or that shall be made or sunk by virtue of such lease to the ground above in order to be freely and properly sold."

The defendants sunk the pit called Astley's New Pit, so as to reach the mine called the Black Mine, which they commenced working in 1858.

In 1862 the defendants carried tunnels from Astley's New Pit lower than the Black Mine down into the mine or seam of coal called the Cannel Mine, which was said to produce coal of a better quality and commanding a higher price than that produced from the Town Lane Mine and the Black Mine. They subsequently, under a new agreement, sunk a second shaft, which was used as the upcast shaft for ventilation, and was also used until the accident hereinafter stated for the purpose of working the Town Lane Mine, the two lower mines being worked through the Astley's New Pit. In the beginning of 1870 an accident occurred in the Dunkirk Colliery of the defendants, by which several lives were lost, which caused attention to be directed to the ventilation of the mine.

In September, 1870, the plaintiffs, the trustees under the will of Francis Astley (who had died in 1866), caused a written requisition to be sent to the defendants, requiring them to work in a proper and workmanlike manner the coal called the Town Lane Mine, and to keep open and in proper condition all the airways and roads in the same mine, pursuant to the provisions in the said lease.

The plaintiffs alleged that the defendants, for some time after working the Town Lane Mine in the manner commenced by the said Francis Astley, at the extremity of the mine and of the roads and airways commenced by Astley, worked the same mine on the south side from near the mouthing of the mine into the air or upcast pit, by means of scaffolding, cages and machinery, and *worked this [36] without having proper pillars on each side of the roads and airways as far as they worked, and so choking up the roads and airways beyond the workings as made by Astley, and left by him at the commencement of the lease; that the defendants afterwards improperly worked the Town Lane Mine, and worked it only a few hundred yards from the mouthing, and shut up the airways and roads in the said

mine, and left a large block of the Town Lane Mine unworked and ungotten, and had allowed the levels and air-gates and water-levels in the same mine to become choked and out of repair.

The plaintiffs further alleged that the defendants were working the Black Mine and Cannel Mine without working the Town Lane Mine, whereas they were bound to continue the workings of each of the three mines after they had commenced them until each mine was exhausted, and to work the block of the Town Lane Mine which they had left unworked; that the defendants had lately ceased to work the Town Lane Mine, and had taken away the scaffolding and machinery placed by them on the demised premises for working that mine, and had done so without regard to the covenants in the lease and the practice of good mining, under the pretext that they could not otherwise comply with the provisions of the act for the regulation of mines, 23 & 24 Vict. c. 151, s. 10, r. 1, which related to ventilation.

The plaintiffs further alleged that the defendants were working the Cannel Mine to the detriment of the Town Lane Mine and the Black Mine; that the Cannel Mine was only fifty yards below the Black Mine; and that, having regard to the nature of the coal measures, the defendants ought, by the rules of good mining and according to the covenants in the lease, not to work the Cannel Mine beyond and in advance of the workings of the Black Mine, but that they had worked, and were continuing to work, the Cannel Mine in advance of the workings of the Black Mine.

The bill prayed, First: That it might be declared that the defendants were bound under their lease not to work the Cannel Mine, and that they might be restrained by injunction from further digging any coal or carrying any workings in the Cannel Mine until they had carried on their workings in the Black Mine to the same point to which they had ex-362] tended their workings in the Cannel Mine, and from working the Cannel Mine to a point beyond their workings of the Black Mine; Secondly: That the defendants might be restrained from allowing the roads and airways in the Town Lane Mine to remain choked up, or otherwise than open and in proper working order, and from continuing the removal of the machinery, scaffolding, and cages for working the Town Lane Mine; Thirdly: That it might be declared that the defendants were bound to continue to work the Town Lane Mine in a proper manner, and might be restrained from working or getting out coal from the Black

Mine and Cannel Mine, or from the Dunkirk Colliery, without continuing to work the Town Lane Mine in a proper manner and according to the covenants in the lease; Fourthly: That the defendants might be ordered, in addition to, or substitution for, any portion of the relief prayed, to pay to the plaintiffs such damages as the court should direct; and for consequential relief.

The defendants, by their answer, submitted that working the said mines in the manner they had done was justified by the circumstances of the case; and that it was not to the prejudice of the other mines comprised in the lease, and was consistent with the covenants in the lease, and was in accordance with the rules of good mining.

The defendants stated that, after the accident before referred to, the Government Inspector pronounced the ventilation inadequate, and gave his opinion that with the mode of working then practised, namely, raising the coal from the upper mine through the upcast shaft, the ventilation was inadequate for safety, and suggested that the upcast shaft or Town Lane Pit should be devoted exclusively to the purposes of ventilation, for which alone it had been originally sunk. They stated that they then caused a minute inspection of the colliery to be made by Mr. Cross and Mr. Higson, two eminent mining engineers, who made a report on the 21st of September, 1870, as to the causes of the defective ventilation of the colliery, and after recommending the removal of a scaffold at the Town Lane Mine, they continued thus: "We are of opinion that the Lower Mine cannot be sufficiently and safely ventilated so long as the Town Lane is being worked; and as it appears that the protection of life is an equal protection of *property, we advise you [363 to abandon the Town Lane Mine, and work with increased energy the Black and Cannel Mines, and thereby avoid the present excessive risk, at the same time that you will secure a better result for all parties concerned."

The defendants stated that the Cannel Mine was about fifty yards only below the Black Mine; that they were advised by competent authorities that they ought not, by the rules of good mining, or according to the covenants in the lease, to abstain from working the Cannel Mine to a point below and in advance of the workings in the Black Mine.

The defendants submitted that they ought to allow the roads and airways in the Town Lane Mine to remain as at present; and that they were working the Black Mine and Cannel Mine in the only proper manner, which was to work them without working the Town Lane Mine.

There was a considerable amount of evidence on both sides. The following were some of the most material passages in the plaintiffs' evidence:

Isaac Wheeldon, a mining agent in Cheshire, stated that "the common mode and usual practice of carrying on coal works of this character was, when the seams were not separated by a very great interval, to work the same together, or to work the upper seam in advance of the seam which was next below it, and not to work such lower seam in advance of such upper seam."

Thomas Livesey, mining engineer, deposed as follows: "The working of one mine under another has the effect of breaking the strata between the two mines, and the Black Mine being only fifty yards or thereabouts above the Cannel Mine, this would be likely to take place, and thus injure the Black Mine both as to the facility of working afterwards, and also as to the quality of coal, thereby doing an injury to the lessor."

Isaac Wheeldon, in a further affidavit, said: "The allegation in the defendants' answer to the effect that it was well known that no one would take a lease of collieries with a restriction requiring the mines to be worked successively from above downwards, does not accurately represent the practice of good mining as understood by competent engineers; the contrary is in many instances true, for in Derbyshire it will be found that lessees are absolutely 364] *restricted by their leases from working lower mines in advance of those above them. When the distance between mines is considerable, a lower mine may be worked in advance of an upper without so much injury to the latter as where the distance is small; but under any circumstances the best and most approved method of working is from above downwards."

The defendants' witnesses stated that it was the usual practice in the district to work a lower seam of coal in advance of an upper seam, when it was commercially desirable to do so. They mentioned specifically several instances where it had been done in South Lancashire and Cheshire, and said that they considered it the best practice in mining, for though it might damage the roads, that would only be an injury to the lessee of the mine, who would be bound to repair them, but that as regarded the mine itself, it would improve the upper mine and increase the coal to the extent of 50 per cent. The following were some of the material parts of the evidence:

William Bryham, mining engineer and colliery proprietor,

deposed : That he had had considerable experience in working the cannel and other seams of coal in the Wigan district, and had to a large extent worked the cannel seam in advance of the superincumbent seams without any injury or detriment to the latter ; that he was at present working the Wigan five-feet and the Wigan four-feet seams extensively over an area of about 200 acres from which the cannel and King coal seams had been recently exhausted (the two latter seams averaging in thickness about 4 ft. 9 in.), and lying at the respective distances of 120 yards and 144 yards above the cannel seam ; that he was convinced from experience that they had not in the least suffered, and the seams were equally as productive and as economically worked as when the cannel was ungotten ; that Wigan district was the real cannel district ; that in all that district the great bulk of the cannel was worked out long before the coal ; that he had many cannel mines under his management ; that in every case he had gone on working the cannel first irrespective of the upper seams ; that in the Wigan district there was ninety yards distance between cannel and upper seams, but it was not an uncommon practice to work out a lower seam when only twenty or twenty-five yards intervened ; that in his experience no material damage had ever arisen ; [365 that something depended on the thickness of the seams—working a thin seam like the cannel seam in the Astley Pit, 2 ft. 3 in., could not, in his opinion, cause damage to the upper mine ; and that it was a common custom to work the best seams first, irrespective of position, unless where the lease specified ; he considered it to be in accordance with the rules of good mining to work in that mode.

Alfred Hewlett, colliery proprietor and mining engineer, deposed : That he was largely engaged in the management and conduct of collieries and iron works, and had been so for the last twenty-seven years—in fact from his boyhood ; that he was a Fellow of the Geological Society of London, and President of the Mining Association of Great Britain, and was the Managing Director of the Wigan Coal and Iron Company, Limited, whose collieries were about the most extensive in the kingdom, employing about 10,000 hands, and raising about 2,000,000 tons of coal per annum ; that he also had very considerable experience in the system of working mines in almost all the districts in the kingdom ; that the workings of the Wigan Coal and Iron Company, Limited, extended over several thousands of acres of mining ground held under lease from a great number of landowners, and were situate in no less than thirteen different townships in and

about Wigan ; that it was entirely unusual, and contrary to the common practice of mining in that district, to compel a lessee to work or pay for an upper mine in quantity equal to that which might be gotten in the subjacent mine ; that such a covenant did not exist in the leases granted to the Wigan Coal and Iron Company, Limited, and, in his judgment, such a covenant would not be conducive to good mining either in the interests of the lessor or the lessee ; and that he considered the obligation attempted to be enforced upon the lessees (the defendants in this suit) to be contrary to the usual custom of fair workmanlike and skilful mining, and to be entirely unusual in mining operations, and contrary to the true interests of either party.

Thomas Wynne, Her Majesty's Government Inspector of Mines for the districts of North Staffordshire, Cheshire and Shropshire, deposed : That no alteration in the scaffolding or cages of the Town Lane Mine would suffice to enable it to 366] be safely worked *concurrently with the other mines from the present shaft, and there was no plan left but sinking a separate shaft.

Jacob Higson, mining engineer, deposed : That he was acquainted with the workings of collieries in Lancashire and Yorkshire, Warwickshire, North Wales and South Wales, in which districts he was actively engaged in the management ; that he was well acquainted with all mining districts in England besides ; that he was a member of the Institute of Mining Engineers (Midland and South Midland), and also the North of England Institute of Mining and Mechanical Engineers, and also consulting engineer to some of the largest collieries in England ; that he entirely dissented from the opinions expressed in the affidavits filed by the plaintiffs in this matter as to the question of working the Cannel Mine in advance of the Black Mine ; that, in his opinion, the defendants ought not, by the rules of good mining, to cease working the Cannel in advance of the Black, and he denied that by so working, the mine was prejudiced in any way, and he did not know a case where a lessee was compelled to work two seams concurrently, or prevented working the Cannel or any other mine in advance, unless where he was positively restricted by the covenants in the lease, and in the absence of such covenants there was no such rule of good mining applicable to all cases as had been suggested on the part of the plaintiffs ; that commerce in that district had invariably regulated the working of the mines, and in most of the instances where lower mines had been worked in advance, it had arisen from the fact that coals from these

mines were salable at that particular time at a higher price than they might have been if the mine had been worked in strict rotation.

There was also specific evidence on the cross-examination of the defendants' witnesses to the effect that, in these and many other mines, working a lower seam in advance improved the working of an upper seam by loosening the strata, relieving the pressure, and so causing a much larger proportion of coal to come out in large blocks, and diminishing the proportion of slack, and that any countervailing injury could always be prevented by leaving a sufficient interval of time between the workings.

In reply to these affidavits, the plaintiffs brought forward several witnesses, one of whom, John Brown, a mining engineer in *Staffordshire, made the following state- [367 ment: "With regard to the working of the Cannel Mine before the Black Mine, I believe there are some cases where, at a less depth from the surface than that in question, the working of an underlying may not damage an overlying mine, but, on the contrary, render its working more advantageous, that is, where no workings have been made, or headings or levels driven, in the overlying mine; but my experience shows that where headings have been made and pillars of coal left, or workings of any kind made in the overlying seam, any working out of underlying coal, being within fifty yards, or even more, will damage the roads in the upper seam and materially affect the pillars, so that when they are worked out great waste must ensue by the crushing of such pillars; and I believe that by working out the Cannel Mine under the roads and pillars in the Black Mine the produce of such pillars will be less valuable than if no workings had been made below; and I consider that the defendants ought to be restrained from continuing such workings."

William Seddon, a Lancashire colliery manager, deposed: "I very much disapprove of working the Cannel Mine in advance of the Black Mine, as I am confident it would injure the Black Mine. When the Cannel Mine is worked first, and the subsidence of the whole strata takes place, the shale lying next to the Black Mine coal being of a tender nature breaks up into small particles and mixes with the crushed coal, which augments the cost of working and depreciates the coal value. I think the proper way of working these two mines is the working of the Black Mine in advance of the Cannel Mine, and that, I am confident, would be the most judicious way of dealing with the matter, and would

most assuredly conduce to the benefit both of the lessors and lessees."

William Blackburne, mining engineer, deposed thus: "The Cannel Mine ought not to be gotten in advance of the Black Mine, and it is contrary to the usual mining custom in this district to work the lower seams before the upper beds of coal have been removed unless it is intended to allow the Black Mine to remain ungotten for a period of not less than two or three years after getting the Cannel Mine. I say the quantity of house fire coal produced in this Black Mine will be decreased, and the levels and airways in the same mine damaged."

368] *Robert Winstanley, mining engineer, deposed as follows: "The usual practice and best mode of working mines of coal is to work the higher seams in advance of the lower, especially in the district in which the Astley deep pit is situate."

Mr. *Fry*, Q.C., and Mr. *Batten*, for the plaintiff: The plaintiff in this case is entitled to a mandatory injunction to restrain the defendants from interfering with the fulfilment of this engagement.

The court has in various cases exercised a similar jurisdiction: *Lane v. Newdigate* (¹); *Storer v. Great Western Railway Company* (²); *Duke of Beaufort v. Morris* (³) (where an order of Lord Eldon's in *Morris v. Smith* is referred to); *Wilson v. Furness Railway Company* (⁴). In this case, even if specific performance of the covenant could not be enforced, we submit that the plaintiffs are entitled to an injunction.

By the terms of the covenant in the lease they are bound to work and carry on the mines with the utmost care and ability, and in the best and most effectual manner, to the best advantage, and according to the common mode and usual practice of carrying on all coal works and collieries with effect. There is no separate demise of each vein; they are demised as an entirety, and therefore the covenant obliges the defendants to work the several veins as a whole, and not to work one vein separately to the injury of another. One vein or mine cannot, according to this covenant, be worked before another, so as to leave another unworked or ungotten, and if a vein is once begun to be worked the works must be continued.

The evidence adduced on behalf of the plaintiffs is conclusive as to the custom of the country, showing that the

(¹) 10 Ves., 192.

(²) 2 Y. & C., Ch., 48.

(³) 6 Hare, 340, 342.

(⁴) Law Rep., 9 Eq., 28.

proper course of mining in that part of the country where the seams are not separated by a very great interval, is to work the same together, or to work the upper seam in advance of the seam which is next below it, and not to work the lower seam in advance of the upper seam. The defendants' evidence, including the report of the mining engineers, Messrs. Higson and Cross, cannot be relied on.

*According to the evidence it is contrary to the [369 practice of this district for the defendants to work the Black Mine and the Cannel Mine without working the Town Lane Mine. The pretext that the mode of working adopted by the defendants was necessary for the safety of the mine cannot be established. They have no right to remove the machinery for working the Town Lane Mine, or to allow the roads or airways in the Town Lane Mine to remain choked up.

On the whole case, we submit that the plaintiffs have established a good ground for the interference of the court.

Sir *R. Baggallay*, Q.C., and Mr. *Hemming*, for the defendants, were not called on.

SIR G. JESSEL, M.R.: The case has been very elaborately argued. I look on this bill as a mere experiment by an experienced equity draftsman, who was perfectly aware from the first that the kind of agreement in this lease as to working the mines was not the sort of agreement of which the court, according to the limits imposed by the authorities on its jurisdiction, could give specific performance; and, being well aware of that, he exercised his ingenuity to see if he could not, by means of an injunction, obtain what in reality was equivalent to specific performance. I repeat the bill does very considerable credit to Mr. Batten (if he will allow me to say so), and to his ingenuity. But unfortunately it fails in substance the moment you admit you cannot get specific performance, as you must here.

By a lease granted in November, 1856, Mr. Astley demised certain mines, together with a pit and depot, in words which are not immaterial; they were as follows: "All such parts and portions, or so much and such parts of all those several mines, delphs, veins, and beds of coal and cannel lying and being under the lands and grounds of F. Astley and G. J. Newton, or either of them as were not then leased, and called the Black Mine, the Town Lane Mine, and the Peacock Mine, with certain exceptions therein mentioned." The word "mine" is clearly there used in its primary sense of "vein," and each mine is named separately.

Then there is a demise of the pit called "Astley's New

370] Pit," and *also, by way of demise and not of exception, with its steam engines, engine-houses, workshops, and other buildings.

[His Honor then referred to other provisions of the lease before the covenant as to working the mines, observing that, if the lease stopped there, the lessees would have the power, but not an obligation cast upon them, to work any of the demised mines, or none of them if they thought fit. He then referred to a covenant to sink the Astley pit to the depth of 300 yards lower than its depth at the time of the lease, and then read the covenant upon which the decision in the case mainly turned.]

The first question which I have to decide is, What does this covenant mean? At the outset we find the plaintiffs coming into this court to ask the court to give effect to a covenant, and being compelled to say it cannot mean what it says. The literal meaning is as absurd as possible, and therefore I must try to find a secondary meaning.

If ever there was a case for an injunction, as distinct from the remedy at law, I suppose it must be founded on a clear contract between the parties, and certainly the plaintiffs, who come here with such an admission as this, have not a very clear contract. Let us see if the plaintiffs can have the benefit of the literal construction. In the first place, are the lessees to work all the mines at all times during their term? That is impossible, for these reasons: first, they could not work the Town Lane Mine while they were sinking the other. The pit was wanted for the purpose of being used for the workmen who were going further down, and for a very considerable time that must be so. In the next place, it is impossible to work the other mines until you get at them, and the very lease, on the face of it, shows you cannot get at them without sinking a pit, and though all parties must have known that with a pit of this size it was impossible to work all these mines, they do not seem to take that into account, but insist on the working of the Town Lane Mine.

For these reasons it is manifestly impossible to adopt the literal reading. But there is another reading, and that is this, that the covenant to work the mines at all times in an effectual manner would compel the lessees to work, although they found faults which might render it excessively expensive to work, and which it *is very unusual to call upon a lessee to work through; and it would also compel them to work a vein at a loss, although that would be to work all the mines at a loss. And this would be particu-

larly so if they were compelled to work the upper vein and Peacock's mine; they might also be obliged to work other seams which are quite unworkable at a profit. But it does not stop there, because that would compel them to go on working after the coal had deteriorated in value, and could not be sent to market at a profit. It would be a most unreasonable and absurd covenant. I am not surprised, looking at it that way, that the counsel for the plaintiffs felt themselves compelled to abandon the literal reading. Then they had to suggest some other reading, and what they suggested was this, that if you begin to work a vein you must continue to work it; but I must say I cannot find in the covenant any arrangement of that sort, and if that were so, I do not know what it would lead to. It is mere conjecture. But, independently of the several reasons I have mentioned, others would apply to that reading as well; for instance, the Town Lane Mine was not at work, but for the reasons I have mentioned it could not continue working during the sinking of the pit; and therefore the covenant could not be held to apply to that; and it appears to me that I am not at liberty to use this covenant as a covenant for continuous working at all, though it might apply to this, that when you do work you shall work in the right way.

But suppose this difficulty removed, the plaintiffs ask for an injunction on this point to restrain the working of the other colliery, while the one which the defendants have begun to work remains unworked. It appears to me that that has no connection whatever with the covenant. There is no covenant not to work any unless you work all, which is what the plaintiffs want. The only covenant they have is, to work all, but the right to work any is under the demise. The lessees have a right, under the previous words, to work any of the mines. You must find a restrictive covenant to cut down the legal effect of the demise, and there is none.

A demise of twenty houses, with a covenant to keep all of them in repair, does not prevent the lessee repairing all but one; it adds, no doubt, an additional obligation on him; but could the lessor *apply to the court to restrain him [372 from repairing nineteen of them until he repaired the twentieth? Is there any difference between that case and this?

It was said when I put this in argument, that there was a connection between the mines here, there being a common pit. But in the case of a single house, with a common staircase and series of flats, and a covenant to repair, could you say that because the tenant was repairing the roof and not the ground floor, that you could apply to the Court of Chancery

for an injunction against him for not repairing the roof until he had repaired the ground floor? It is the same thing here. This is not an affirmative covenant which includes a negative. There is a judgment of Lord Hatherley, when Vice-Chancellor, in the well-known case of *Pollard v. Clayton*⁽¹⁾, which bears on this point.

Whilst I am upon this covenant I may mention something about another point. It was said that there was a vein called the Cannel Mine, which ought not to be worked in advance of the Black Mine. But when you come to look at it, in reality, the complaint is, not that you work the Cannel Mine in advance, but that you do not work the Black Mine fast enough. What is said in effect is, that if the defendants had worked the Black Mine as fast as the Cannel Mine the plaintiffs would have been content; but of course they cannot get specific performance of that. They therefore ask to stop the defendants from working the Cannel Mine till the Black Mine is worked up to it. Not being able to compel the working, they seek by the form of an injunction to stop the working of another mine—the Cannel—which the defendants have a perfect right to work.

It appears to me, looking at the covenants, that I cannot grant the injunction which the plaintiffs ask. I might well stop there, but I do not think it would be quite satisfactory, because a great deal of evidence has been gone into as to the facts, and it is necessary I should advert to this in order to make the case intelligible. The first complaint, as I have said before, is, that the Town Lane Mine has been shut up. Now, if I am right in what I have said, the plaintiffs cannot get any injunction to compel the defendants to shut up the Cannel Mine till the other is worked.

373] *But there is another ground alleged by the defendants, which is admitted by the plaintiffs to be an insuperable difficulty if it is true in fact. The defendants say it is impossible, with a pit of the present size, having regard to the requirements now made by the legislature with regard to the safety of the workmen in deep mines, to work the Town Lane Mine because there would not be sufficient ventilation. If that is so, even the plaintiffs admit the court ought not to interfere by injunction.

In March, 1870, there was a frightful explosion in this mine, and many men were killed. The Government Inspector interfered, and he said in effect: "Your pit is not large enough; the upcast shaft through the Town Lane Mine is not large enough to work the Town Lane Mine, and to ven-

(¹) 1 K. & J., 462.

tilate the other; upon considering the whole matter, I am of opinion the best thing to be done is to shut up the Town Lane Mine, and go on with the other veins."

This seems to have been rather unpalatable advice to the defendants, and they did not immediately act on it, but they called in two other engineers—Mr. Higson and Mr. Cross—to advise what was best to be done; and in September, 1870, Messrs. Higson and Cross made a report, which report puts it very strongly in the same way as did the government inspector. [His honor then read the report.]

It is suggested by the plaintiffs that this evidence is not to be depended on, and that their witnesses' evidence is. If the defendants' evidence is the correct version, the effect of an injunction would be to shut up all the mines, and leave the defendants subject to a dead rent.

Now I will consider the evidence on this point, but before doing so, I must say how the plaintiffs contest it. They contest it by producing the evidence of some experts, whose evidence was met by at least as many experts on the part of the defendants. As to this, I may say what I think I have often said before, that in matters of opinion I very much distrust expert evidence, for several reasons. In the first place, although the evidence is given upon oath, in point of fact the person knows he cannot be indicted for perjury, because it is only evidence as to a matter of opinion. So that you have not the authority of legal sanction. A dishonest man, knowing he could not be punished, might be inclined to *indulge in extravagant assertions on an occasion that [374 required it. But that is not all. Expert evidence of this kind is evidence of persons who sometimes live by their business, but in all cases are remunerated for their evidence. An expert is not like an ordinary witness, who hopes to get his expenses, but he is employed and paid in the sense of gain, being employed by the person who calls him.

Now it is natural that his mind, however honest he may be, should be biassed in favor of the person employing him, and accordingly we do find such bias. I have known the same thing apply to other professional men, and have warned young counsel against that bias in advising on an ordinary case. Undoubtedly there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them.

Accordingly, we find in doubtful cases the most remarka-

ble results. Take this case: there are two questions; one, whether sufficient ventilation exists for three mines; the other, whether the Cannel Mine ought or not to be worked in advance of the Black Mine. Well, we have the witnesses giving evidence for the plaintiffs' view of the matter, or the defendants' view, according as they are sought out and paid by each. It is very natural, and just what one would expect, but it leads one to distrust their evidence. There is also this to be said against them, namely, that their evidence is not the evidence of fair professional opinion. The men are selected according as their opinion is known to incline.

Suppose a person wants to sell a house, and as he wants a very high value put upon it, he sends to ten valuers, and out of these he selects the three who have put the highest value on the house. The purchaser wants a very low value, and selects out of a number of valuers three of the lowest. Each set of valuers values high or low, according to the requirements of the person who employs them. I have known the same sort of thing done even as regards medical evidence. The consequence is, you do not get fair professional opinion, but an exceptional opinion by evidence selected in this way.

375] *That being so, when I have expert evidence I am, as I said before, very distrustful *a priori*; and I am anxious to ascertain the character of the experts, and to see the position they occupy.

In this case I have this circumstance, that of the five experts for the plaintiffs, four are ordinary experts, the fifth is an agent for the plaintiffs and in their regular employment, and that being more continuous, his bias would be rather greater. When I look to the defendants' witnesses, three of them are of a very different character. The first, Wynne, is not in the ordinary sense an expert witness at all. He is the Government Inspector of Mines, and was not paid for this purpose. The advice he gave was given in the course of his employment as government inspector, and with a view to the safety of the mine. It was given before there was any dispute. The advice he gave was given long ago, and it was advice upon which the defendants were not willing in the first instance to act. As regards Higson and Cross, although not of such good position as Wynne in these respects, they are in a better position than ordinary experts. They were called in to advise the defendants before any contest arose. Their opinion was given in the shape of a formal report, and not with a view to the success of the suit. They are parties interested, in the sense of acting for the

defendants, to assist them in giving *bona fide* advice for the more advantageous conduct of the mine, but not to assist them in the litigation. Therefore I look upon their evidence as much better and more to be depended on than ordinary expert evidence.

If, therefore, the witnesses were all equally positive, I certainly should prefer the evidence of the defendants; but when I come to examine the plaintiffs' evidence, I find the evidence is not nearly so positive as that of the defendants. As regards this matter of the ventilation, the majority of the witnesses say there would be sufficient air if the passages in the lower mines, especially the Black Mine, were constructed on a larger scale.

On the whole, I am satisfied, on the balance of testimony, that the defendants are right on this point, and that it would be dangerous to continue the working of the Town Lane Mine, together with the Black Mine and the Cannel Mine. Therefore I ought not to interfere by injunction, and on this point the plaintiffs' case fails.

*The next point taken was that the plaintiffs were [376 entitled to an injunction to prevent the Town Lane Mine "remaining choked up, or otherwise than open and in proper working order."

Now the jurisdiction of this court does not extend to the performance of covenants to repair. It is clear I cannot grant an injunction that the defendants shall not be at liberty to work the other mine till they put the Town Lane Mine in repair.

The other part of the case that was seriously fought was this: It appears that about some fifty yards below the Black Mine there is a vein of coal of about 2 ft. 3 in. in thickness, which is a very profitable mine to work at the present time, and the defendants are working it (as it is termed) in advance of the Black Mine. One of the witnesses says they took 11,000 tons a week out of the Cannel Mine, and only 600 tons out of the Black Mine, so that it would appear that the cannel coal is worked more rapidly than the Black Mine coal, and that the Cannel Mine has been almost exhausted, whilst the Black Mine is very little worked; and the allegation is, that this is contrary to good mining. An admission was made that it was not contrary to good mining to work a coal mine as they are working the cannel, provided they did not work the Black Mine at all—but that concedes the whole case, if I am right in the construction I put upon the covenants, that if they are entitled to work the Cannel Mine alone, they are

not the less entitled to work it because they work the Black Mine. If they work it without working the Black Mine, they may equally work it if they do work the Black Mine.

But it is said, if you work the Black Mine at the same time as the Cannel Mine, the roads and passages of the Black Mine will be injured by reason of the taking away of this additional quantity of material, which will cause a subsidence and injury to the roads.

That may be so, but still that does not give a right to injunction.

The injury done is an injury done to the working of the Black Mine. Either you are working the Black Mine properly, or you are not; but whether so or not, for that is the point, the plaintiffs admit if you work the Black Mine fast enough no injury will happen; or rather their complaint is that the Black Mine is worked improperly by not being worked away fast enough.

377] *Suppose it was a negative instead of an affirmative injunction that was asked. You could not ask for an injunction to restrain them from working the Cannel Mine, and on that ground the plaintiffs must fail. As regards the Black Mine, you cannot have an injunction for not working fast enough. There is no form of injunction applicable to it, and therefore the remedy by injunction is simply out of the question.

But passing from that, let us just look a little at the fact. Now the fact in dispute, and the issue to be decided, is this: whether working the two mines or seams together, but working the lower mine in advance, is in accordance with the common mode and usual practice of carrying on coal works or collieries with effect, which refers of course to that district; because, with regard to usual practice, we know that it varies very much with the nature of the mine and the nature of the fuel which is extracted; the practice of one district has little or no application to the practice of another. Now on this there has been a great deal of evidence, and I must say that the evidence is overwhelming in favor of the defendants, and that is evidence not merely of opinion but of fact. [His Honor then reviewed the evidence of the plaintiffs' witnesses and the evidence of the defendants' witnesses, and said that while the one set of witnesses were vague and unsatisfactory, the other gave conclusive evidence, founded on specific facts, in favor of the defendants' mode of working the mines, and continued:]

The result is, that it is proved that the mode of working adopted by the defendants (whether the best possible mode

I do not say) is the common mode and usual practice, and consequently there is no ground for accusing them of a breach of contract, or of doing anything which entitles the plaintiffs to come to this court for an injunction.

The bill must be dismissed with costs.

Solicitor for the plaintiff: Mr. *E. H. Barlee*, agent for Messrs. *Buckley & Son, Ashton-under-Lyne*.

Solicitors for the defendants: Messrs. *Phelps & Sidgwick*, agents for Messrs. *Sale, Shipman & Co., Manchester*.

[Law Reports, 17 Equity Cases, 378.]

M. R., Jan. 13, 14, 15, 1874.

***HOWARD V. EARL OF SHREWSBURY.(')** [378

[1872 H. 133.]

Infant Plaintiff—Practice—Ejectment Bill.

Where an infant is entitled both at law and in equity to real estate as against another who is in wrongful possession, he is entitled to recover in equity on a bill stating these facts and asking a declaration of title and account, and may join adult remaindermen as co-plaintiffs.

Crowther v. Crowther (*) not followed.

THE plaintiffs in this suit were the devisees under the will of Bertram, seventeenth Earl of Shrewsbury, namely, Edward George Baron Howard of Glossop, the Earl of Gainsborough, Lord Edmund Bernard Howard, an infant, by the Duke of Norfolk, his brother, and next friend, and Francis Edward Howard, also an infant, by his next friend.

The defendants were the Earl of Shrewsbury and the trustees of the Shrewsbury settled estates, namely, John Gilbert Talbot and Alfred Charles Duncombe.

The object of the suit was to obtain a declaration by the court *that certain estates (called for convenience prop- [379 erties numbered respectively 1, 2, 3, and 4) passed under the devise in the will of the said Earl Bertram, and that the plaintiffs were entitled to the same accordingly.

*SIR G. JESSEL, M.R.: Now, the only point left to [398 consider is, whether the plaintiff the infant, the first tenant for life, could succeed on such an allegation as that contained in the bill without more, and I was referred on that point by the leading counsel of the defendant to the decision of Lord Romilly in *Crowther v. Crowther* ('), where he says: "It is said that this is the case of an infant, and that the principle

(') The greater portion of this case is of no value in this country, and is omitted. M.

(*) 23 Beav., 305.

(*) 23 Beav., 305, 308.

above stated does not apply to the case of an infant; but I think the authorities cited do not establish any such distinction. This court will not allow an infant to be turned out of possession of an estate without legal process, and, accordingly, the cases cited are all instances of a person intruding on an infant in possession, either by himself or his guardian or bailiff; but if it is admitted that the infant never was in possession or in the enjoyment of the property, either by himself or his guardian, he stands in the same situation as any other person, and must first establish his legal title."

I must say, because I am driven to it, I am clearly of opinion that that is not a correct statement of the law. If Lord Romilly had decided this for the first time, and there were no other decision on the subject, I should be bound to follow that decision, and should most unhesitatingly follow it; but in the first place, I am satisfied that the then Master of the Rolls did not intend to establish any new law at all. He was merely stating what appeared to him to be the result of the decisions, and he confined his remarks to the authorities cited before him. Having looked at all those authorities, I find, somewhat to my surprise, that they do not bear out the statement at all. I have also looked at a great many others which are entirely contrary to it. I will, out of respect to my predecessor, advert to one or two of them. I cannot help thinking that Lord Romilly had forgotten for a moment the technical meaning of the word "intruding" and that "intruding" was used in the old books, not in the sense of turning anybody out, but of taking the vacant possession immediately after the death of the ancestor, before the heir or devisee entered, and that that misled him a little, I think, as to what the authorities mean. But it is, I think, quite plain, on the authorities stated by him, without going to the others, that no such distinction can be made out.

One of these authorities was the case of *Newburgh v. Bickerstaffe* (¹), which was a bill depending on a title of some marsh lands, and the judgment is this: "The Lord Keeper observed, that Littleton says if a man intrudes upon an infant, he shall receive the profits but as guardian"—that means intrude in the technical sense, not in the sense that the infant was already in possession—"and the infant shall have an account against him in this court as against a guardian." There the court retained the bill, and directed a trial in ejectment, so that it did not act on any notion of the word "intrude." Now the very retention of the bill shows that the court was in favor of the infant's right, that in quot-

(¹) 1 Vern., 295.

ing those words of Littleton, the then Lord Keeper understood them in the sense I have mentioned, because he did not dismiss the bill, but he retained the bill, directing an action to be tried to determine the legal right, which I should have been compelled to do here had it not been for the passing of Sir John Rolt's Act. The case, therefore, is an authority in favor of the right of the infant, and shows that the word "intrude" must not be used in the modern but in the technical sense.

The next case is the case of *Yallop v. Holworthy* (¹), which I need not cite. The next is of more importance, *Morgan v. Morgan* (²); that is a case before Lord Hardwicke, when Lord Chancellor, and he states the law in this way: "Where any person, whether a father or a stranger, enters upon the estate of an infant"—not turns the infant out, but takes the estate—"and continues the possession" *—that is what [400 has happened in this case, because the present earl has since the death, there being an intervening earl, entered into possession, with the consent of the trustees, of the rents and profits during the infancy of the plaintiff, the first tenant for life—"this court will consider such person entering as a guardian to the infant, and will decree an account against him, and will carry on such account after the infancy is determined." So that he does not state the law to be that the infant must be turned out of possession, or that the law does not apply, or that it was a case of an infant who had ever been in possession.

The next case cited is *Dormer v. Fortescue* (³), before the same judge. There the Lord Chancellor says this: "So in the case of a bill brought by an infant to have possession of the estate," not merely an account of rents and profits, but "possession of the estate and an account of rents and profits, the court will decree an account from the time the infant's title accrued, for every person who enters on the estate of an infant enters as a guardian or bailiff for the infant;" thus putting the case not at all as Lord Romilly put it, but in the broadest terms, irrespective of whether the infant was in possession or not. The next case is a case of *Blomfield v. Eyre* (⁴). There the infant had never been in possession, and he sought to take away the property from some other person who had purchased the property, and Lord Langdale says (⁵): "Considering the infancy of the plaintiff, and the notice which the defendant possessed at

(¹) Eq. C. Abr., p. 7, pl. 10.

(⁴) 8 Beav., 250.

(²) 1 Atk., 489.

(⁵) Ibid., 258.

(³) 3 Atk., 124, 130.

the time of his purchase, it appears to me, that if the plaintiff establishes his title, he will be entitled to consider and to treat the defendant as having possessed the estate in the character of bailiff, and as being liable to account accordingly." The last case cited was a case of *Hicks v. Sallitt* (¹), which I do not think has any direct bearing upon this proposition.

I have gone through the cases cited before Lord Romilly to show that they do not bear out the proposition which he thought they did. There are other authorities very distinct, such as *Wyllie v. Ellice* (²), and the case of *Boddy v. 401 Lefevre* (³), and the numerous *cases in the notes to that case, but it is not necessary to go into them. The result therefore is, adopting the language of Lord Hardwicke, that an infant is entitled to treat a stranger who takes possession of his estate as his "bailiff" or agent, to get, if he likes, from him an account of the rents and profits, and a decree for possession. But it is said that such an account is usually decreed with wilful default; that nothing is mentioned here about wilful default, and that the mere fact of its not being mentioned prevents the court from decreeing an account. Now I do not agree to that. Supposing that the plaintiff alleges the defendant to be mortgagee in possession, then prays an account of rents and profits and general relief, can it be said that he cannot take the account for wilful default? He has put in the necessary allegations on which his title to the account depends; and therefore, if it were pressed before me, I should have given an account in that shape. But it was not asked, and there is no occasion for me to consider it; of course it is always desirable not to make men account for more than they have actually received.

That being so, I think the plaintiffs' title is established; that is, the title of the plaintiffs according to their order. The first tenant for life takes first, and the others in order. It is immaterial that they have been made co-plaintiffs. And I think that there must be a declaration accordingly, and an order to take an account against the present earl of the rents and profits from the time he entered into possession; and that possession of the estate should be given up to the infant's guardian.

Solicitors for the plaintiffs: Messrs. *Currie & Williams*.
Solicitors for the defendants: Messrs. *Parkin & Pagden*.

(¹) 3 D. M. & G., 782.

(²) 6 Hare, 505.

(³) 1 Hare, 602, n.

[Law Reports, 17 Equity Cases, 405.]

M.R., March 2, 4, 1874.

*GAINSFORD v. DUNN.

[405]

[1873 G. 184.]

Will—Non-exclusive Power of Appointment—Gift of Legacies followed by Gift of Residue—Implied Charge of Legacies.

The doctrine of *Greville v. Browns* ⁽¹⁾, viz., that a gift of legacies, followed by a gift of the residue of the real and personal estate, charges the legacies on the residuary real estate, is applicable to a gift of legacies followed by a gift of residue of all the property of the testator, and over which the testator has a power of appointment, though the power be special and non-exclusive; and in such a case the legacies are charged on property subject to a power of appointment.

A testatrix, having power to appoint certain funds by will in favor of A., B., C., D., and E., in such parts, shares, and proportions as she might think fit, and having no other power, by her will gave legacies of £5 each to A., B., and C., and all the residue of her property, of whatever kind and wheresoever situate, and over which she had any power of appointment, to D., and E., and died leaving some personal estate of her own:

Held, that the will was a valid execution of the power.

THIS was a special case.

Under a settlement dated the 31st of August, 1841, the trustees of certain funds were directed, in the events which happened, to hold them on trust for T. Dunn, Mary Dunn, Elizabeth Gainsford, S. R. Dunn, and J. I. Stainton (the brother and sisters of Anne Dunn), or their respective issue, in such parts, shares, or proportions as Anne Dunn should by will appoint.

Anne Dunn made her will, dated the 20th of November, 1869, which (omitting formal parts) was as follows: "I appoint my sisters, Mary Dunn and Sarah Rebecca Dunn, executors. I give and bequeath to my brother Thomas Dunn, and to my sister Elizabeth, the wife of Robert John Gainsford, Esquire, and Jane Isabel Stainton, the wife of Henry Tibbats Stainton, Esquire, the sum of £5 each. All the rest and residue of my property, of whatever kind and wheresoever situate, and over which I have any power of appointment or disposition, I give, devise, and bequeath unto and to the use of my sisters Mary Dunn and Sarah Rebecca Dunn, their *heirs, executors, administrators, and assigns respec- [406 tively, for their own absolute use and benefit as tenants in common."

It was stated that Anne Dunn left some property of her own; the exact amount was not given. She was not at her death entitled to exercise any power of appointment other than that stated above.

⁽¹⁾ 7 H. L. C., 689.

The first question in the case was, whether the will of Anne Dunn was a valid exercise of the power of appointment. It is unnecessary to state the other questions.

Mr. *Southgate*, Q.C., and Mr. *Owen*, for the plaintiffs: The power is non-exclusive. Anne Dunn has appointed nothing to her brother T. Dunn, or her sisters Elizabeth and Jane Isabel. The will is therefore not a good exercise of the power.

[The MASTER OF THE ROLLS referred to *Greville v. Browne* (').]

The doctrine of that case has never been applied to wills made in exercise of special powers.

[They referred to *In re Teape's Trusts* (').]

Mr. *Kenyon S. Parker*, for defendants in the same interest.

Mr. *Roxburgh*, Q.C., and Mr. *Ince*, for other defendants, were not called on as to this question.

Mr. *Morshead*, for the trustees.

SIR G. JESSEL, M.R.: There never was a better illustration of the extreme technicality of our law than the case I have before me. One must really state what the law is in order to understand the point raised. Under the old law, when a power was given to appoint among a class in such parts or shares as the appointor should direct, it was held, not irrationally, that the meaning of the person creating the power was, that the appointor should appoint a substantial share to each object of the power. The power was called a non-exclusive power, and it was considered that the author of the settlement intended everybody to take a substantial [407] share. That was not according to the *literal wording of the power, but it made sense of it: because if the appointment of a farthing would do, then, on the principle "*de minimis non curat lex*," it would make every non-exclusive power an exclusive power. However that doctrine was found inconvenient. No one knew exactly how much a substantial portion of the property was, and it was impossible to say, without resorting to litigation, what the least sum was which the appointor was authorized to appoint. That inconvenience led to an alteration of the law, and the legislature, under the guidance of a very great lawyer, made this very remarkable alteration: it directed that in future no appointment might be objected to on the ground of its being illusory, that is, on the ground of the smallness of the sum or share appointed, but it did not alter the construction of the power. The consequence of this remark-

(') 7 H. L. C., 689.

(') Law Rep., 16 Eq., 442.

able alteration of the law has been this, that where the power is non-exclusive, if the appointor forgets to appoint a shilling, or even a farthing, to every object of the power, the appointment is bad, because some one is left out. One would have imagined that the reasonable mode of altering the law would have been to make every power of appointment exclusive, unless the author of the settlement had pointed out the minimum share which every object was to get. However that is not the state of the law, and in this present instance an appointment by a lady, who had a power of appointment between her brother and her sisters, is objected to, because it is said she has forgotten to appoint a shilling to the brother and two of her sisters, she intending that the remaining two sisters should take the whole of the property. I have now to decide whether this appointment is bad on that ground. That question depends on the construction of the lady's will, and that, again, depends on the rules or construction which have been adopted, certainly not with a view to the exercise of powers of appointment, but with respect to a very different subject-matter.

There can be no doubt that this is a non-exclusive power. The power is: [His honor stated it:] Therefore Anne Dunn could only appoint among those persons named in the settlement, and she could only appoint in such shares and in such manner. She had no power to exclude any one. She was a spinster. It was stated that she had some personal estate, and that it was small, but my judgment does not turn on the amount of it, which is not stated *in the special case. She has made her will as follows: [408 [His honor read it.]

Now it was conceded in argument that if the lady had given a shilling out of the appointed fund to the brother Thomas and to the sister Elizabeth and the sister Jane, then, under the words I have mentioned, the two other sisters, Mary and Sarah Rebecca, would have taken the fund over which she had a power of appointment, absolutely. But it was said that the appointment would fail altogether, because she had given nothing out of the appointed fund to the brother and to the two sisters. That, as I said before, is a question of construction of the will. It was opened as if it was incapable of argument; but I think it not only capable of argument, but, upon consideration, I have not even called on the other side. The question is, whether any part of the sums of £5 each given to the brother and the two sisters is or is not payable out of the fund subject to the power of appointment. The gift is, no doubt, of £5 only,

and if there had been nothing else afterwards, would have been a common legacy out of her personal estate. Then she gives the rest and residue of her property, of whatsoever kind, and wheresoever situate, and over which she has any power of appointment or disposition, to the use of her sisters Mary Dunn and Sarah Rebecca Dunn, their heirs, executors, administrators, and assigns, for their own absolute use and benefit. So she has given the residue, first of her property, and next of property over which she has a power of appointment; she has given them together. Now this kind of gift has been the subject of frequent judicial decision. I may refer to the case of *Bench v. Biles* (*), to the case of *Greville v. Browne* (*), and the later cases of *Francis v. Clemow* (*) and *Gyett v. Williams* (*) before Vice-Chancellor Wood. Those cases were cases of a gift of residue of real and personal estate; but the result of the cases is this: that where you find a legacy followed by a gift of the residue of real and personal estate, the word residue is considered to mean that out of which something given before has been taken, and the result is to make the residue a mixed fund, and to charge the legacies proportionally and ratably upon 409] the mixed fund. The *question has generally arisen when the personal estate has failed, when it is said the legacy is payable out of the real estate. But in truth it is payable out of both funds, by force of the word residue, and therefore to some extent depends on the relative value of the funds. That being so, and applying that doctrine, the sums of £5 each are payable partly out of the testatrix's own property, and partly out of the fund appointed. The rule is, that there must be at least a farthing payable out of the fund subject to the power, and, as I said before, however small the sum appointed may be, the appointment cannot be objected to as being illusory. This is an appointment out of the fund of some portion of the £5 to the brother and each of the two sisters. The consequence is, I hold the power well executed, and each of the ladies will take, subject to the small legacy, the whole of the appointed fund, and thus I can give effect to this lady's will. In fact, it is an instance, of which we have so many, of a technicality defeating a technicality, and the true intention of the testator taking effect.

Solicitor: Messrs. *Dobinson & Geare*; Messrs. *Tanqueray-Willauwe & Hanbury*.

(*) 4 Madd., 187.

(*) 7 H. L. C., 689.

(*) Kay, 435.

(*) 2 J. & H., 429.

[Law Reports, 17 Equity Cases, 409.]

M.R., March 21, 1874.

In re ELLIS' TRUSTS.

Married Woman—Bequest of Consols absolutely—Restraint on Anticipation.

Where a fund producing income is given absolutely to a married woman, and the gift is followed by a restraint on anticipation, the married woman is prevented from alienating the fund during coverture.

A testatrix, by her will, gave to a married woman a sum of consols; and by a codicil directed that all gifts and provisions (whether absolute or limited) thereby or by her will made for any female should be for her separate use, and (whilst she should be under coverture) without any power of anticipation. The executor transferred the fund into court under the Trustee Relief Act, and the married woman presented a petition for a transfer of the fund to herself:

Held, that she could only have the income paid to her during her coverture.

As to the effect of a clause restraining anticipation on an absolute gift of a fund not producing income, *quære*.

ELIZABETH ELLIS, by her will, dated the 21st of May, 1860, gave to Augusta Maria Allen (a married woman) the sum of £500 *£3 per Cent. Consolidated Annuities; [410 and she also thereby gave to married women various life interests, and also sums of stock and money, which were to be paid and transferred to the legatees after the determination of life interests thereby bequeathed to other married women. One such legacy was of £20 only. By a codicil dated the 18th of March, 1871, the testatrix directed that all gifts and provisions (whether absolute or limited) thereby or by her will made for any female should be for her separate use, and (whilst she should be under coverture) without any power of anticipation.

The testatrix died on the 15th of September, 1873, and her executor transferred into court a sum of consols to answer the above-mentioned legacy to Augusta Maria Allen.

Augusta Maria Allen now presented a petition, asking for a transfer of the fund to herself.

Mr. *North*, for the petition: I submit, in the first place, that the codicil does not apply at all to such a gift as this. The gift is of a sum of stock, to take effect immediately on the testator's death, and, from its nature, does not admit of being anticipated. The codicil restrains "anticipation," and can only apply to gifts which are capable of being anticipated, of which there are plenty in the will. The testatrix could never have intended so small a legacy as one of £20 to be invested, and the income only paid to the legatee. But if the codicil does apply, still the petitioner is entitled

to payment. All that the codicil restrains is alienation by way of anticipation; it does not restrain alienation generally, and therefore there is nothing to prevent payment to the petitioner. In *Re Sykes' Trusts* (*), where a married woman was restrained from anticipating a fund, it was held that a charge created by her before the fund became payable was ineffectual, but after the fund had become payable, the court ordered it to be paid to her.

[The MASTER OF THE ROLLS: In that case married women were restrained from making "any sale, mortgage, charge, or incumbrance of or upon their respective parts or shares of the said trust fund, or of the annual income thereof." Surely that was a restraint from alienation generally.]

411] *Throughout the argument and judgment the restraint is treated as being against anticipation, and the case is therefore an authority to show that where the restraint is against anticipation only, the fund may be paid out of court.

[The MASTER OF THE ROLLS referred to *Baggett v. Meux* (*).]

That was a case of real estate, as to which different considerations may apply. In *Re Sarel* (*) and *Re Gaskell's Trusts* (*), Vice-Chancellor Wood held that where there was a restraint on alienation, as distinguished from anticipation, the corpus of a fund could not be paid out of court.

[The MASTER OF THE ROLLS: The words which are the subject of the decision in *Re Gaskell's Trusts* are undistinguishable from those which were used by the testator in *Re Sykes' Trusts* (*); and if there is no mistake about the latter case (which I am inclined to think there is), I must follow *Re Gaskell's Trusts*. It is a later decision of the same judge, and I observe that *Re Sykes' Trusts* was cited.]

It is submitted that all the cases can be reconciled if the distinction between alienation and anticipation is attended to.

The MASTER OF THE ROLLS: I am not at all certain that that distinction was brought before the mind of the Vice-Chancellor in *Re Sykes' Trusts*.

His honor referred to *Spring v. Pride* (*) and *Armitage v. Coates* (*).

Mr. Henderson, for the executor.

(*) 2 J. & H., 415.

(*) 1 Coll., 138; 1 Ph., 627.

(*) 4 N. R., 321; 10 Jur. (N.S.), 876.

(*) 11 Jur. (N.S.), 780.

(*) 10 Jur. (N.S.), 646.

(*) 35 Beav., 1.

SIR G. JESSEL, M.R.: I cannot accede to the ingenious arguments of Mr. North, but it is very surprising to find that there is no distinct authority on the question I have to decide.

The testatrix, by her will, gives to Augusta Maria Allen (who is a married woman) a sum of bank annuities. The subject-matter *of the gift is, therefore, not a sum of [412 money, and I do not now decide anything as to such a gift. What the testatrix has done is to give a perpetual annuity to a married woman absolutely; it is not, strictly speaking, a gift of a capital sum, but of a perpetual annuity, subject to redemption by the state.

Having done that, the testatrix, by her codicil, directs that all gifts and provisions (whether absolute or limited) thereby or by her will made for any female shall be for her separate use and (whilst she shall be under coverture) without any power of anticipation.

The first question is, whether these terms apply to this gift of bank annuities? I cannot accede to the argument that they do not. The language of the codicil appears to me to be plain and distinct. The direction extends to all gifts, whether absolute or limited; and it appears to me to apply, and to have been intended by the testatrix to apply, to this gift.

The next question is, assuming that the direction does apply, what is its effect on the gift? It is said that a gift to a married woman of bank annuities, followed by a restraint on anticipation, enables her to take the whole fund at once. It seems to me that a restraint on anticipation as applied to an annuity, prevents the annuitant from getting all the future payments of the annuity at once; if she took them all at once, it would be as plain an anticipation as one could have. That is rather a narrow ground to take. Still I think that, considering the nature of the gift and the language of the will, there is sufficient to enable me to decide the question on this ground alone.

But I also think that after the two decisions in *Baggett v. Meux* (*), it must be considered as settled that where there is an absolute gift to a married woman of a fund producing income, followed by a restraint on anticipation, the restraint on anticipation prevents her from alienating the fund during coverture; and I prefer to decide the case on that broader ground.

It is admitted that the position of a married woman as to property which she is restrained from alienating is anomalous.

(*) 1 Coll., 138; 1 Ph., 627.

lous. It is apparently assumed by Vice-Chancellor Knight 413] Bruce in *Baggett v. Meux* that a married woman may be restrained during coverture from alienating a fund producing income. He says this⁽¹⁾: "It being clear, and admitted on all hands, that, with respect to a life interest given to a married woman for her separate use, she may be effectually restrained from doing, during her coverture, any act of alienation total or partial (without any clause of forfeiture, and without any limitation over taking effect upon such an act),—it being clear, as I apprehend, that a clause prohibiting alienation or anticipation by a married woman of her separate estate (when there is no such provision of forfeiture or limitation over), however the prohibition may be expressed, whether in terms confining it to a period of coverture, or in terms general and undefined, or in terms distinctly expressing a period beyond as well as during coverture, has by law validity allowed to it, as to a life interest, at least, but that this validity is by the same law (whatever the expressions) not permitted to extend to a period beyond coverture (that is, the law of its own force, preventing the restriction from operation or effect as to any act done when coverture does not exist)—I am at a loss to discover any sufficient reason why that which holds good as to a life interest should not equally hold good as to an absolute estate. Why should there be any difference?

It is true that the actual decision in that case applied to real estate, but the passage I have read appears to me a clear expression of opinion by Vice-Chancellor Knight Bruce that, so far as restraint on anticipation is concerned, there is no distinction between capital and income.

Then on appeal, the Lord Chancellor says⁽²⁾: "After the case of *Tullett v. Armstrong* (³), there can be no doubt about the doctrine of this court respecting the property given to the separate use of a married woman: and it is clear that that doctrine applies as much to an estate in fee as to a life estate. The object of the doctrine was to give a married woman the enjoyment of property independent of her husband; but to secure that object, it was absolutely necessary to restrain her during coverture from alienation. The reasoning evidently applies to a fee as much as to a life estate 414] *to real property as much as to personal." That shows that the Lord Chancellor thought there was no distinction between real and personal estate, between *corpus* and income.

Though I find no direct decision on the point, I think

(¹) 1 Coll., 149, 150.

(²) 1 Ph., 628.

(³) 4 My. & Cr., 377.

there is sufficient authority to enable me to say that there is no distinction between personal estate producing income and real estate producing rent. I repeat that I decide nothing as to the effect of a clause restraining anticipation where no income is produced. Here I think the petitioner can only have the income paid to her during coverture.

Solicitors: Messrs. *Norris, Allens & Carter*; Messrs. *Tanqueray-Willaume & Hanbury*.

[Law Reports, 17 Equity Cases, 426.]

V.-C.B., Feb. 19, 1874.

***ASKEW V. ROTH.**

[426

[1872 A. 99.]

Will—Construction—Savings of Separate Estate—"Purchased"—Money at Bank.

Under a testamentary appointment by a married woman of "all funds and property which have been or shall be purchased out of the savings of property to which I have been or shall be entitled to my separate use":

Held, that savings out of separate estate standing to her account at her bankers' did not pass.

ADJOURNED summons on behalf of defendant J. J. Rowley, claiming, as general administrator of his deceased wife, a sum of £1,944 17s. 4d. consols, representing a sum of £1,787 8s. 9d., cash paid by, or by direction of, the deceased wife to her account at the Sheffield and Rotherham Bank.

On the marriage of the testatrix, Mrs. Rowley, in 1844, to the defendant, her second husband, settlements were executed under which certain property given to the testatrix for her separate use by the will of her first husband was settled upon trusts as to the income for Mrs. Rowley for her separate use without power of anticipation; and after her death, in case her husband, J. J. Rowley, should be living, and should not be an outlaw or uncertificated bankrupt, and should not have previously become an insolvent debtor within any Insolvent Debtors Act, and should not have done any act or thing whereby the interest, &c., should have been in anywise assigned, charged, or incumbered, upon trust to pay the interest to J. J. Rowley during his life, until outlawry, bankruptcy, insolvency, or assignment, and, subject to certain trusts for children which had not taken effect, upon trust to pay the interest, dividends, and yearly income unto defendant J. J. Rowley, or his assigns, or to permit him or them to receive the same for and during the

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Askew v. Rooth.

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term of his natural life absolutely, and from and after his decease, then as to as well the capital of the said trust premises as the interest, dividends, and annual income thereof, in trust for such persons as the said testatrix should by deed or will (notwithstanding coverture by any future husband) appoint; and in default of appointment, in trust as therein mentioned.

427] *There were no children of the marriage, and in November, 1852, Mr. and Mrs. Rowley separated, but no separation deed was ever executed.

By her will, dated the 28th of March, 1870, in exercise of the power of appointment given to her by the settlements of June, 1845, Mrs. Rowley directed that all moneys, shares, stocks, and securities, and all other (if any) trust funds and premises subject to her power of appointment, should, on the determination of the trusts prior to the power, be transferred to defendants S. Rooth and William Askew, her executors, and trustees. After directing payment of her just debts, funeral and testamentary expenses, and giving legacies to her executors, and giving two sums of £3,000 upon trusts for members of her family, testatrix appointed and declared that her trustees should stand and be possessed of, and interested in, all the residue and remainder of the said trust funds and property upon trust to pay the annual income thereof to the sons living at her death of her brothers Michael and William Askew, in equal shares, with trusts as to the capital for the issue of such nephews; and she also appointed, gave, and bequeathed "all funds and properties whatsoever or wheresoever which have been or shall be purchased out of the savings of property to which I have been or shall be entitled for my separate use to the same persons, and upon the same trusts, and in the same manner, and as part of the property hereinbefore appointed, and to be applied without multiplying the legacies and provisions hereinbefore appointed and bequeathed."

Mrs. Rowley died on the 21st of July, 1872, and in September, 1872, general letters of administration were granted to J. J. Rowley. On the 14th of October, 1872, probate was granted limited to such personal estate and effects as the testatrix had, by virtue of the settlement made on her marriage, a right to appoint or dispose of, and had in and by her said will appointed or disposed of accordingly, but no further or otherwise.

Amongst other property left by the testatrix was a balance of £1,787 8s. 9d. at her bankers', the Sheffield and

Rotherham Banking Company, which balance arose from savings effected by her out of her separate estate.

A suit having been instituted by one of the legatees for *administration of the trusts of the will and administra- [428
tion of Mrs. Rowley's estate, a decree was made on the 31st of May, 1873, by which an inquiry was directed as to what the funds and property described in Mrs. Rowley's will as "purchased out of the savings of property to which she was entitled for her separate use" consisted at her death.

In reference to this item of £1,787 8s. 9d., one of the executors in his affidavit stated that it consisted of cash which had been, by or by the direction of the testatrix, paid to her account at the Sheffield and Rotherham Bank, "the whole of the money so paid in, except the rents of the Blind Lane property hereinafter mentioned, arose, I have no doubt, from the property comprised in the settlement made upon the marriage of Mrs. Rowley with her second husband. My belief as to the said cash having arisen as aforesaid arises from my being a trustee of the said settlement, and from my having examined the pass-book, and from my not being aware that Mrs. Rowley had, and my belief that she had not, any source from whence to derive money other than the said settled property and the Blind Lane property. The only money so paid into the said account which did not arise from the said settled property is a few pounds produced by the rents of some freehold property in Blind Lane."

In a further affidavit the various items paid to the credit of Mrs. Rowley's account were identified as having arisen from her separate estate.

The £1,787 8s. 9d. and interest thereon having been paid into court at the instance of defendant Rowley and invested, the defendant now applied, by summons adjourned from Chambers, for payment of the stock representing the £1,787 8s. 9d., as forming part of Mrs. Rowley's general estate.

Mr. *Bagshawe*, Q.C., and Mr. *Kekewich*, in support of the claim by the administrator to the fund as undisposed of, cited *Taylor v. Meads* (*); *Johnstone v. Lumb* (*); *Humphry v. Richards* (*); *Re Rosenthal's Settlement* (*); *Spicer v. Dawson* (*).

*Mr. *Kay*, Q.C., and Mr. *W. S. Owen*, for the execu- [429
tors and trustees, contended that the balance at the bank passed under the appointment. A large signification would

(1) 4 D. J. & S., 597.

(4) 6 W. R., 189.

(2) 15 Sim., 308.

(5) 5 W. R., 481.

(3) 25 L. J. (Ch.), 442.

be given to the word "purchased," which, in its primary meaning, was equivalent to "acquired."

At the death of Mrs. Rowley the balance to her credit at the bank resulting from the savings of her separate estate, was a debt from the bankers, which was purchased by depositing with them these savings of her separate estate, and fell within the description of funds and property purchased out of the savings of her separate estate.

Mr. *Eddis*, Q.C., and Mr. *Cookson*, for the plaintiff, one of the legatees under Mrs. Rowley's will: The word "purchase," in its primary sense, means "to acquire;" and "to buy with money or for a price" is a merely secondary meaning: *Latham's English Dictionary*.

SIR JAMES BACON, V.C., said that he could not accede to the argument that "purchased" had exactly the same meaning as "acquired." He must hold that Mrs. Rowley had not by her will disposed of that sum of money which was lying as a balance at her bankers'. As undisposed personalty this item of £1,787 8s. 9d. was subject to the debts of the testatrix, and passed to her general administrator.

Solicitors: Messrs. *Frere & Co.*; Messrs. *Singleton & Tattershall*, agents for Mr. *W. E. Tattershall, Sheffield*; Messrs. *Dobinson & Geare*.

[Law Reports, 17 Equity Cases, 440.]

V.-C.H., Jan. 29, 30, 31; Feb. 11, 1874.

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*DE LISLE V. HODGES.

[1873 D. 60.]

Gift of Residue of Specific Fund—Residuary or Specific—Abatement.

By deed and by will two funds of £37,914 and £800 consols were settled, with powers of varying investments, upon trusts for the nephews and nieces of R. H., subject to a power in R. H. of exclusive appointment among them. R. H. made and revoked a series of appointments, and ultimately, by a deed-poll in November, 1870, (at which time the fund had been reduced to £27,170 consols and £8,000 cash), R. H., after recting a desire to revoke the subsisting appointment of the two funds, and to appoint the same amongst his nephews and nieces named, in the shares and proportions and in manner expressed, in pursuance of that desire appointed that the trustees should stand possessed of the two funds "or other the stocks, funds, and securities" of which the same then consisted, or thereafter should or might consist, or upon which the same or any part thereof was then or thereafter should or might be invested, upon trust as to £7,000 consols, part of the £37,914 and £800 consols, or other the stocks, funds, or securities of which the same might consist, for his nephew, S. H., absolutely. R. H. then appointed in like manner further sums (making an aggregate of £37,000 consols), in trust for the four nieces and nephew named; and the residue of the two several sums of consols or other the stocks, funds, or securities,

&c., in trust for his niece C. The trust funds at the death of R. H. were insufficient to pay the £37,000 consols:

Held, that the gift to C. was residuary and not specific, and that it failed altogether.

By an indenture dated the 28th of May, 1822, a sum of £37,914 13s. 9d. Consolidated £3 per Cent. Annuities, standing in the names of three trustees, was settled, subject to the life interests of Benjamin Hodges and his son Richard Hodges, and in the event, which happened, of there being no child of Richard Hodges, "in trust for all and every of the nephews and nieces of the said Richard Hodges, being the child and children lawfully to be begotten of William Robert Hodges, Benjamin George Hodges, Catherine Mazzinghi, and Amelia Ann Whitgreave, in such part, shares, or proportions, and for any one or more of the said nephews and nieces of the said Richard Hodges in particular, and in exclusion of any other or all the others of them, and to be and become a vested interest, and to be paid and payable at such age or ages, time or times, and with, under and subject to such powers, provisos, *restrictions and limitations [441 for the benefit of some or one of the said nephews and nieces of the said Richard Hodges as he, the said Richard Hodges, by any deed or deeds, instrument or instruments in writing, with or without power of revocation" . . . "or in and by his last will and testament, or any codicil or codicils thereto" . . . "shall, from time to time, or at any time, direct or appoint; and in default of any such direction or appointment, or so far as any such direction or appointment shall not extend, then it is hereby declared and directed that they, the said trustees, and the survivors or survivor of them, his executors and administrators, shall stand possessed of and interested in the sum of £37,914 13s. 9d. £3 per Cent. Consolidated Bank Annuities, or the stocks, funds, or securities to be substituted in lieu thereof, or such part or parts thereof as shall remain unapplied or undisposed of under the trusts or powers created by these presents, in trust for the nephews and nieces of the said Richard Hodges."

After the death, on the 23d of April, 1827, of Benjamin Hodges, and in accordance with the provisions of his will, dated the 5th of October, 1822, and of the 4th codicil thereto, dated the 19th of July, 1823, a sum of £800 Consolidated £3 per Cent. Annuities thereby settled by him on the trusts declared by the indenture of settlement of the sum of £37,914 13s. 9d. consols was transferred into the names of the trustees of the settlement.

The settlement contained a power for the appointment of new trustees, and under it there had been divers appointments made. The settlement also contained a power for the trustees, with the consent in writing of Richard Hodges, to change the investments, and there was authority to acquire new investments in public stocks or funds, on government or real securities, or loans, or investments upon such other security as Richard Hodges should direct; and under these powers there had been divers sales and reinvestments. The plaintiffs, the present trustees, were, with another, since deceased, appointed trustees of the settlement on the 1st of July, 1853, and at that date the sums of £37,914 13s. 9d. and £800 consols were, in consequence of such sales and reinvestments, and the payment of certain sums of costs represented by a sum of £27,170 15s. 4d. consols and £8,000, invested in the mortgage of an estate belonging to Richard 442] Hodges. Richard Hodges, who had *made divers appointments of the funds, all of which he afterwards revoked, executed a deed-poll dated the 30th of November, 1870. In that deed there were recitals of previous appointments in which were reserved powers of revocation. According to those recitals, each of the prior appointments recited that Richard Hodges was desirous of appointing the two original trust funds amongst his nephews and nieces in the shares and proportions thereafter expressed, and the operative part of each appointment was expressed to be for the purpose of carrying the said desire into effect, and in consideration of the natural love and affection which Richard Hodges had for his nephews and nieces thereafter named. The funds appointed by such prior appointments were, according to the recitals thereof, the two funds, and according to such recitals, the powers of revocation, and the revocations and appointments mentioned those two funds only, although there had been, before all, except the first of such appointments, the change of investment above mentioned. There were also recitals in the deed-poll of November, 1870, of the desire of Richard Hodges to revoke the then subsisting appointment of the two funds and to appoint the same amongst his nephews and nieces thereinbefore named in the shares and proportions and in manner thereafter expressed. The first operative part of the deed revoked the last preceding appointment of the two funds, and the second operative part, after stating that it was in pursuance of the said desire and in consideration of the natural love and affection which Richard Hodges had for his nephews and nieces thereafter named, was as follows :

"That from and immediately after his decease the trustees of the indenture of May, 1822, should stand and be possessed of and interested in the said sum of £37,914 13s. 9d. Consolidated £3 per Centum Annuities so standing in their or some or one of their names in the books of the Governor and Company of the Bank of England, or other the stocks, funds, and securities of which the same now consist, or hereafter shall or may consist, or upon which the same, or any part or parts thereof, is now or hereafter shall or may be invested, upon the trusts and for the intents and purposes hereinafter expressed and contained of and concerning the same." And also, that from and immediately after his decease the same trustees, or the trustees of the will and codicil of his late father, *Benjamin Hodges, "shall stand [443 and be possessed of and interested in the said sum of £800 Consolidated £3 per Centum Annuities so standing in their or some or one of their names in the books of the Governor and Company of the Bank of England, or other the stocks, funds, and securities of which the same now consist, or hereafter shall or may consist, or upon which the same or any part or parts thereof is now or hereafter shall or may be invested, upon the trusts and for the intents and purposes hereinafter expressed and contained of and concerning the same; that is to say, provided always, and I, the said Richard Hodges, do hereby declare that the direction and appointment of the said two several sums of £37,914 13s. 9d. and £800 Consolidated £3 per Centum Annuities is so made, and the said two several sums shall be held by the said trustees or trustee, or other the trustees or trustee for the time being, upon the trusts and for the intents and purposes following, that is to say, as to the sum of £7,000 Consolidated £3 per Centum Annuities, part of the said two several sums of £37,914 13s. 9d. and £800 Consolidated £3 per Centum Annuities, or other the stocks, funds, or securities of which the same may for the time being consist, or upon which the same may for the time being be invested, upon trust for my nephew Sydney Hodges, son of my brother William Robert Hodges, his executors, administrators, and assigns absolutely. And as to the further sum of £7,000 Consolidated £3 per Centum Annuities, further part of the said two several sums of £37,914 13s. 9d. and £800 Consolidated £3 per Centum Annuities, or other the stocks, funds, or securities of which the same may for the time being consist, or upon which the same may for the time being be invested, upon trust for my niece Julia George, daughter of my said brother William Robert Hodges, her executors, administra-

tors, and assigns, for her and their own absolute use and benefit, free from the debts, control, contracts, or engagements of her present or any future husband. And as to the further sum of £7,000 Consolidated £3 per Centum Annuities, further part of the said two several sums of £37,914 13s. 9d. and £800 Consolidated £3 per Centum Annuities, or other the stocks, funds, and securities of which the same may for the time being consist, or upon which the same may for the time being be invested, upon trust for my niece Josephine 444] Amelia Baroness French, *daughter of my sister the Countess Catherine Mazzinghi, her executors, administrators, and assigns, for her and their own absolute use and benefit, free from the debts, control, contracts, or engagements of her present or future husband. And as to the further sum of £6,000 Consolidated £3 per Centum Annuities, further part of the said two several sums of £37,914 13s. 9d. and £800 Consolidated £3 per Centum Annuities, or other the stocks, funds, or securities of which the same may for the time being consist, or upon which the same may for the time being be invested, upon trust for my niece Teresa Eyston, daughter of my sister Amelia Ann Whitgreave, her executors, administrators, and assigns, for her and their own absolute use and benefit, free from the debts, control, contracts, or engagements of her present or any future husband. And as to the further sum of £10,000 Consolidated £3 per Centum Annuities, further part of the said two several sums of £37,914 13s. 9d. and £800 Consolidated £3 per Centum Annuities, or other the stocks, funds, or securities of which the same may for the time being consist, or upon which the same may for the time being be invested, upon trust for my nephew Frederick Hodges, son of my brother Benjamin George Hodges, his executors, administrators, and assigns absolutely. And as to the residue of the said two several sums of £37,914 13s. 9d. and £800 Consolidated £3 per Centum Annuities, or other the stocks, funds, or securities of which the same may for the time being consist, or upon which the same may for the time being be invested, upon trust for my niece Caroline, daughter of my said brother Benjamin George Hodges, her executors, administrators, and assigns, for her and their own absolute use and benefit, free from the debts, control, contracts, or engagements of any husband with whom she may intermarry."

Then followed a power of revocation, which was expressed to be to revoke the direction and appointment thereby made of the said two several sums, specifying them, but not adding the words "or other the stocks, funds or securities."

Richard Hodges died on the 25th of July, 1872, leaving him surviving all his said nephews and nieces. The trust funds (at the time of the filing of the bill in April, 1873) consisted of the £27,170 15s. 4d. consols, and £8,652 2s. 5d. cash; and as *questions had arisen among the defendants as [445 to the proportions in which they were entitled to them, the trustees prayed that the rights and interests of the defendants in these sums of consols and cash might be ascertained and declared, and that the trusts of the sums of £37,914 13s. 9d. and £800 consols might be carried into execution under the direction of the court; and for consequential relief. The trust funds had been paid into court and invested, and were represented by a sum of £35,819 8s. 4d. consols.

Mr. *Dickinson*, Q.C., and Mr. *Hemming*, for the plaintiffs, stated the facts of the case.

Mr. *Karslake*, Q.C., and Mr. *Cracknall*, for the defendant Sydney Hodges: The question resolves itself more into one of language than of law. The case is not like that of the *Attorney-General v. Drapers Company* (*), and those referred to in *Hawkins on Wills* (*). The gift is of certain sums of consols or other the stocks, funds, or securities of which the same may for the time being consist, or upon which the same may for the time being be invested; and a further gift of the "residue," which means if there should be any residue of this uncertain and fluctuating body of securities, liable to be altered from time to time, after all the other previous specifically appointed sums had been provided for. The principle acted upon in *Petre v. Petre* (*), where it was held that the residuary gift failed, is applicable to and governs this case; and the decision in *Harley v. Moon* (*) bears exactly upon it, and shows that the word "residue" must have its ordinary meaning—the residue after the legacies of £37,000 consols have been paid.

Mr. *H. R. Young*, for the defendants Mr. and Mrs. George: The only questions are, whether the prior appointees are to abate so as to let Caroline Hodges take a proportionate part of the funds; or whether she is to take nothing under the gift to her of the residue? In *Oke v. Heath* (*) there was an appointment under *a power of a certain sum, upon [446 a condition that the appointee paid an annuity; and of the residue, and a loss was sustained; and Lord Hardwicke, acting on the maxim "*Qui sentit commodum, sentire debet et onus*," held that the loss must fall on the residue, and

(*) 4 Beav., 67.

(*) 1 Dr. & Sm., 628.

(*) Page 66.

(*) 1 Ves. Sen., 135.

(*) 14 Beav., 197.

that the £4,000 was not to be burthened with any part of it. Supposing the funds in this case had been increased instead of diminished, it would be, and probably successfully, argued that Caroline would be entitled to all the "overplus." But however that might be, it is submitted that the rule laid down in that case, and in *Lefevre v. Freeland* (*) and *Booth v. Atlington* (*), practically decides the question here, viz., that the prior appointees must first be satisfied, and then if there should be a residue Caroline is to take it. If there should be none (which is the fact) she cannot take any.

Mr. *H. S. Milman*, for the Baron and Baroness French.

Mr. *Greene*, Q.C., and Mr. *Romer*, for Frederick Hodges, and

Mr. *Leonard Field*, for Mr. and Mrs. Eyston—all defendants in the same interest—were not called upon.

Mr. *Lindley*, Q.C., and Mr. *Bagshawe*, Q.C., for Caroline Hodges: There is a well established general rule which is applicable to all cases of this description; and there is nothing in the deed-poll to take this case out of that rule. On the contrary, this deed coincides with it. "Residue" in such a case is to be treated as much a part of the fund as the sums appointed. The recitals in all the deeds of appointment, those revoked and the one subsisting, are very important. The appointor treated the two sums of consols as the one trust fund which he intended to appoint, although in 1853, when new trustees were appointed, the trust funds were a sum of consols and a sum on mortgage. Those circumstances are also important. He appointed all that he had power over; and though he knew that the two original sums of consols did not exist, yet he treated them as existing, and he appointed them amongst his nephews and nieces 447] in the shares and proportions and in the *manner thereafter mentioned. He dealt with a fund which was not subject to any fluctuating charge or to debts, or anything of that kind; but in *Petre v. Petre* (*) there was a charge of debts. These trust funds merely depended upon their market value, which of course fluctuates. He appointed the original specific trust funds, and in doing so used a compendious expression—the funds formerly existing, then existing, and which might thereafter exist. The same expression was repeated in regard to each appointee. There was to be a division in shares and proportions. The intention of the appointor was to apportion these funds in proportion to the sums mentioned, and there not being sufficient

(*) 24 Beav., 403.

(*) 6 D. M. & G., 613.

(*) 14 Beav., 197.

to pay the appointees in full, there ought to be an abatement: *Page v. Leapingwell* (*). If there had been no changes of investments, and certainly if consols had fallen in value prior to the reinvestment of the £8,000 in them, there would have been a residue. But could it be contended in any case that if any of the appointments of the specific sums had had failed, Caroline would take the *quasi* lapsed share? Certainly not. *In re Harries' Trust* (*), *Sugden on Powers* (*), *Booth v. Alington* (*), in which there was no appointment of residue, and *Oke v. Heath* (*), are not really applicable to this case; and *Easum v. Appleford* (*) may be referred to for the express purpose of getting rid of the argument that the question here is merely one of the meaning of the English language. The residuary appointment applies to a particular part of the original funds. In *Wright v. Weston* (*) there was a gift of a certain sum, but an abatement was directed; though the argument there was, as here, that "residue" meant "residue." The appointor here has shown that his object was apportionment. In *Elwes v. Causton* (*) there was an insufficiency to pay the whole of the funds appointed, and all parties had to abate in proportion; so in *Miller v. Huddleston* (*).

[The VICE-CHANCELLOR referred to *Rawlinson v. McMahon*, mentioned in *Booth v. Alington*.]

*The strong points in this case are the intention of [448 the appointor to apportion the two funds amongst his nephews and nieces—that is distinctly mentioned in the recitals—in shares and proportions; that he was not dealing with any funds of a fluctuating nature; and that he appointed in strict conformity with the recitals, for he used in each case the words "further part of the said two several sums." If he had left out the words "or other the stocks, funds, or securities," and had appointed specific sums of the two trust funds, and then appointed the residue of those two funds, or, in other words, had specified the residue as £1,714 13s. 9d.—and for present purposes the appointment ought so to be read—everything would have been plain, and no difficulty would have occurred. The intention would have been manifest that Caroline should stand *pari passu* with the others. The appointor was dealing with the trust funds which once existed. He mentioned what they were, and expressed a wish to appoint them as they were, and it

(*) 18 Ves., 468.

(*) Joh., 199.

(*) 8th Ed., 461.

(*) 6 D. M. & G., 618.

(*) 1 Ves. Sen., 135.

(*) 10 Sim., 274; 5 My. & Cr., 56.

(*) 26 Beav., 429.

(*) 30 Ibid., 554.

(*) Law Rep., 6 Eq., 65.

is submitted that there ought to be a declaration that Caroline is entitled to a proportionate part of those funds, and that the costs of all parties ought to be paid out of them.

[They also referred to *Hewitt v. George* (*).]

Mr. *Karslake*, in reply, referred to *Dyose v. Dyose* (*), *Vivian v. Mortlock* (*), and *Walpole v. Aphthorp* (*).

SIR CHARLES HALL, V.C.: The question in this case is one of construction of the appointment made by the deed-poll of the 30th of November, 1870.

[After stating the facts of the case (above set forth), the Vice-Chancellor continued:]

The trust funds existing at the death of Richard Hodges in July, 1872, were and are now insufficient to satisfy the several appointments which precede the last trust, i. e., the one for the appointor's niece Caroline. The question is, Is Caroline to take nothing and the others to abate, or is the appointment to Caroline, although expressed to be of the residue, the same in legal operation as an appointment 449] of £1,714 13s. 9d., the balance of the two funds, *or other the stocks, funds, and securities upon which that sum was then or might thereafter be invested?

On behalf of Caroline it has been contended that the latter is the correct view, and that the present case is to be decided as Sir William Grant decided the case of *Page v. Leapingwell* (*). In that case Sir William Grant held that the testator had clearly shown that he considered he was dealing with and appointing not less than £10,000, and that the last donee in the series of legatees to whom the "overplus" was given was, under the gift of overplus, entitled to be treated as if he had had given to him a specified sum, i. e., a sum equal, as if the sum had been stated in figures, to the balance of a sum of £10,000, after paying the sums previously given. There not being in fact in that case £10,000, all the beneficiaries were required to abate ratably. It is to be observed that under the gift of "overplus" Sir William Grant considered that had there been more than £10,000 the excess would have passed as "overplus."

In *Petre v. Petre* (*), a testator having a power of appointment by will over a sum of stock bequeathed two sums of £5,000 and £5,000 sterling thereout to A. and B., and the residue to his son. The stock became in equity liable to his debts, and by payment thereof and of the costs of the suit the fund became less than £5,500 sterling. The Master of

(1) 18 Beav., 522.

(2) 1 P. Wms., 305.

(3) 21 Beav., 252.

(4) Law Rep., 4 Eq., 37.

(5) 18 Ves., 463.

(6) 14 Beav., 197.

the Rolls held that the pecuniary and residuary legatees were not liable to abate proportionally, but that the residuary gift failed altogether. The Master of the Rolls said⁽¹⁾: "The authority of *Page v. Leapingwell* applies where the testator disposes of an estate which he assumes will produce a given sum, or with an ascertained fund, in which cases it is indifferent, whether, after he has given certain portions, he specifies the remainder by stating its amount, or by comprising it under the term of 'residue.' But in this case, so far from knowing the amount of the fund, the testator could have no conception of it; for it was impossible to ascertain the amount until the fund had been realized by a sale and the charges on it known. If in this case it appeared that the testator thought he was dealing with a sum of £7,100 sterling, and he had divided it into different *proportions, the loss would then fall on all the per- [450 sons interested in proportion to their shares, although the last portion were called the 'residue,' but that is not the case here."

In *Elvies v. Causton* (²), a testatrix bequeathed various sums of her bank stock, part of £9,000 like stock, to several legatees, and all the residue of her said bank stock to C. C. The stock at her death was insufficient to pay the specified sums. It was held that all these legacies, including the residue to C. C., must abate in proportion. The Master of the Rolls said (³): "I am of opinion that this case comes within the principle acted on in *Page v. Leapingwell* (⁴), which was followed by me in the cases cited. If a man dealing with a sum of stock of a specific amount say, I bequeath so much to A., so much to B., and the rest to C., the fund must be divided in those exact proportions, and if the stock falls short, the loss must be apportioned amongst all the legatees in the same proportion. The distinction between this case and the case cited by Mr. Lindley is this, that the latter was the case of a legacy payable out of stock, and there was no gift of the residue, which makes all the difference. If a man says, I have £1,500 stock, of this I give £1,000 to A. and the rest to B., it is the same as if he said, I give £1,000 of it to A. and £500 of it to B., and both A. and B. are equally objects of his bounty."

Many other cases were referred to in the argument. I do not refer to them, because most of them had some special circumstances, and the law is really not in question. The

(1) 14 Beav., 200.

(2) 30 Beav., 554.

(3) 30 Beav., 555.

(4) 18 Ves., 468.

question is, does the deed-poll of the 30th of November, 1870, deal with, or, at all events, make an appointment in reference to and regulated by specific funds of an unvarying amount, or does the appointor assume that a given sum will be available, or does the deed-poll not so deal, and the appointor not so assume? I think the deed-poll does not so deal with the trust fund, and the appointor does not so assume. The appointor, in specifying what each appointee is to take, superadds the words, "or other the stocks, funds, or securities," &c.; such words expressly referring to variations of investment already made or thereafter to be made. I think the present case cannot be brought within the case of *Page v. Leapingwell*, and cases of that class. I do not overlook that the two funds *are more than once (three times) mentioned without the addition of the words, "or other the stocks," &c.; but the places where those words are omitted do not include any of the parts of the instrument in which the particular sums to be taken by each are declared. I do not overlook that the two funds specified would not—and that the appointor, no doubt, knew when the deed-poll was executed—suffice by a considerable sum to provide for the appointees prior to Caroline. The appointor commenced his appointments, i.e., made the first recited appointment, when the two specified funds remained unchanged, and he continued to refer to those two funds subsequently to the change of investment. He did not, I think, in terms declare that these two funds should be considered as continuing for the purpose of measuring and apportioning the benefits taken by all the appointees. So to hold would, I think, be to depart from the ordinary meaning and force of the word "residue" upon conjecture, and not upon a construction afforded by intention clearly manifested upon the face of the instrument. I am not, I consider, warranted in treating the words "or other," &c., as merely supplementary and subordinate. Much reliance was placed on the recital mentioning that the appointment was to be in shares and proportions, but this recital is, I think, insufficient to show that Caroline was, at all events, intended to take ratably with the other appointees. On the whole, I hold that the trust funds must be distributed ratably amongst the appointees, exclusive of Caroline.

Solicitors for the plaintiffs: Messrs. *Young, Jackson & Co.*

Solicitors for the defendants: Messrs. *Saunders & Hawkford*; Messrs. *Gedge, Kirby & Millett*; Messrs. *Harting & Son*.

[Law Reports, 17 Equity Cases, 463.]

V.-C.M., Nov. 22; Dec. 3, 4, 20, 1873.

***DORIN V. DORIN.**

[463

[1873 D. 28.]

Will—Illegitimate Children—Gift to Children held to apply to reputed Children.

A testator gave all his real and personal property to his wife, M. D., in trust to apply the same to her own personal use for life, and he left her at liberty to dispose of the property amongst their children by will as she should think fit; and, should she make no will, he desired that the property existing at her death should be divided equally between his children by her. The testator had two illegitimate children by M. D., who were recognized by him and baptized as his children, and he had married her the day before he made his will. There were no children born after the marriage:

Held, that the two illegitimate children were the objects of the power of appointment to M. D., and that they would take as the children of the testator by her in default of her executing the power.

JOSEPH ALEXANDER DORIN made his will, dated the 30th of April, 1864, in the following terms: "I bequeath all I possess, real and personal property, to my wife, Margaret Christiana Dorin, in trust, that she shall apply the same to her own personal use during the term of her natural life. And I leave her at liberty to direct the disposal of the property amongst our children by will at her death, in such manner as she shall think fit; and should she make no will I desire that the property existing at her death shall be divided, so far as it may be practicable to do so, equally between my children by her. And I nominate my said wife, Margaret Christiana Dorin, to be the sole executrix of this my will."

The testator died on the 22d of December, 1872, and the will was proved by his widow, the plaintiff, who was now his sole legal personal representative. He died seised of a freehold house at Bayswater, and possessed of personal property of the value of about £23,000.

The testator was twice married. By his first marriage he had two children, both of whom died before the date of the will. One of these children died intestate, and without issue; but the other, a son, left issue an only child, the defendant, Arthur Frederick Dorin, who was now his heir-at-law and next of kin.

By the plaintiff, with whom he intermarried on the 29th of *April, 1864, the day before the date of his will, he [464 had two illegitimate children, that is to say, the defendants, Charles Alexander Dorin and William James Dorin, both

of whom were born previous to the marriage; the elder of the two in November, 1855, and the younger in May, 1861. They were consequently infants of the respective ages of eighteen years and twelve years.

Difficulties had arisen as to the extent of the interests of the persons beneficially interested under the will. This bill was therefore filed by the testator's widow for the administration of his estate, and that the trusts of the will might be declared, and might be carried into effect under the direction of the court.

It appeared from the evidence that the testator was married to his first wife, Anna Patton, at Calcutta, on the 12th of April, 1823. That he continued to live with the said Anna Dorin in India for many years, until she left him and came to England. That the testator also returned to England in the year 1840, and remained until 1842, during which time he lived with his wife, Anna Dorin. He then went back to India, and there formed a connection with the plaintiff, who was then the widow of a Mr. Twentymen, and he lived with her until his final return to England, in June, 1858. He had had one child by Mrs. Twentymen while in India, namely, the defendant, Charles Alexander Dorin. Upon the testator's return home he again resided with his wife, Anna Dorin, until the month of October, 1859, when he lived only partially with her, and was frequently absent in London, residing during those periods with the plaintiff, until the death of Anna Dorin, which took place on the 9th of April, 1863.

The defendant, William James Dorin, the second son of the plaintiff by the testator, was born in England, in May, 1861, and both these children were baptized in a Roman Catholic chapel in London. There was an affidavit by John Bonus, a Roman Catholic priest, to the effect that, according to the rules and practice of the Roman Catholic Church illegitimate children cannot be baptized in their father's name without his consent, and that the testator gave the witness his consent in writing to the said children being baptized in his name, and that he well knew the testator was cohabiting with the plaintiff, and that the testator always acknowledged these children, and treated them as his own.

465] *There was further evidence showing that the testator had always recognized these children and treated them as his own.

Mr. Cotton, Q.C., and Mr. Kekewich, for the plaintiffs, the trustees, stated the facts of the case.

Mr. *J. Pearson*, Q.C., and Mr. *Millar*, for the grandson of the testator: This is not a case in which any particular interest can be raised on behalf of the illegitimate children of the testator. The hardship lies on the part of the grandson, the son of the only surviving legitimate child. If the property is held to go to the two illegitimate children, then the heir of the testator and his only grandson is unprovided for; on the other hand, if the gift fails, then the grandson will take as heir and next of kin of the testator, after the death of the plaintiff. The rule as to illegitimate children is laid down in the case of *Warner v. Warner* (*). Here there are no words used except "children," and that word signifying legitimate children, it must be taken that no children of the testator by his wife Margaret Dorin can take, except legitimate children. In all the authorities upon this subject the question has been whether illegitimate children were sufficiently designated. In *Wilkinson v. Adam* (†) the devise was "to the child or children I may have by Ann Lewis," who was not his wife. There the testator designated his illegitimate children. It was a necessary implication, that is, so strong a probability of intention, that a contrary intention could not be supposed. *Crook v. Hill* (‡) was a very peculiar case; the testator chose to designate his daughter as the wife of a man to whom she was actually married, although no valid marriage could ever have taken place between them, as she was his deceased wife's sister, therefore the words could not apply to legitimate children. The testator denoted those particular illegitimate children of his daughter by a particular man, and he knew there could be no legitimate children between his daughter and that man. In the case of *Gabb v. Prendergast* (†) the limitation under which illegitimate children were held to take *was in a settlement, but it was assumed that the construction of the same words in a will would have excluded illegitimate children born at the date of the will, because of the possibility that legitimate children might be born after the date of the will.

In *In re Brown's Trust* (†) the testator distinctly says that the gift is to include illegitimate children. In order to let in illegitimate children under a gift to children, it must be clear upon the terms of the will itself, or according to the state of facts at the making of it, that legitimate children never could have taken. This is the spirit and meaning

(*) 20 L. J. (Ch.), 273.

(†) 1 V. & B., 422.

(‡) Law Rep., 6 Ch., 311.

(*) 1 K. & J., 439.

(†) Law Rep., 16 Eq., 239.

of Lord Eldon's position in *Wilkinson v. Adam*⁽¹⁾, and forms a test by which the claim of illegitimate children is always to be tried.

[They also cited *Jarman* on Wills⁽²⁾; *In re Sayer's Trusts*⁽³⁾.]

Mr. *Glasse*, Q.C., and Mr. *Vaughan Hawkins*, for the two illegitimate children of the testator: It is impossible to satisfy the words of this will without applying them to the illegitimate children of the testator, which he had had by his wife before his marriage with her. Nothing can be more distinct than the definition of the illegitimate children. They were the only children who could answer the description, and it has often been decided that, where illegitimate children are distinctly pointed out, there the gift to such children will take effect: *Wilkinson v. Adam*.

In *Crook v. Hill*⁽⁴⁾, Lord Justice James said, "The question resolves itself into this: whether, having regard to the language of this will, guarding ourselves scrupulously against indulging in conjecture, or in an attempt to do what we think the testator would have done if he had been better informed, or better advised, but taking into consideration the whole of the will, and the whole of the surrounding circumstances at the time the will was made, which are legitimately to be brought in for the purpose of explaining his expressions, though not for the purpose of altering or adding to them, there is in this case so strong a probability of intention to include or not to exclude the children in question as 467] *that a contrary intention cannot be supposed." Then he looks to the facts which surrounded the testator when he made his will. In *Beachcroft v. Beachcroft*⁽⁵⁾, it was held that parol evidence might be given to show who the testator considered in the character of children. Looking at all the circumstances in this case it cannot be supposed that this testator, by using the words "our children" and "my children by her," could mean any other children than those he and she then had. The case of *Owen v. Bryant*⁽⁶⁾, is strongly in our favor, where a testator gave property to be divided among all and every his children by his then wife, and it was held that one child, out of his nine children, who was illegitimate, took equally with the others. So in *Lepine v. Bean*⁽⁷⁾, where there was a gift by a testator of the residue of his property equally between all his children,

(1) 1 V. & B., 422.

(2) 3d Ed., vol. ii., 205.

(3) Law Rep., 6 Eq., 319.

(4) Law Rep., 6 Ch., 311, 315.

(5) 1 Madd., 430.

(6) 2 D. M. & G., 697.

(7) Law Rep., 10 Eq., 160.

and he had no legitimate children, it was held that an illegitimate child living at the date of the will was entitled to the whole property, a subsequently born child being excluded.

Then, in answer to the argument that by deciding in favor of existing illegitimate children it would be excluding subsequently born legitimate children, we submit that even if the testator contemplated the possibility of future legitimate children, there is no rule which should prevent them from taking jointly with illegitimate children. This was clearly stated by the judges in *Wilkinson v. Adam*(¹), and *Owen v. Bryant*(²).

Mr. Pearson, in reply.

Dec. 20. SIR R. MALINS, V.C.: The question in this case arises upon the will of Joseph Alexander Dorin, dated the 30th of April, 1864, which is in these few words: "I bequeath all I possess, real and personal property, to my wife, Margaret Christiana Dorin, in trust, that she shall apply the same to her own personal use during the term of her natural life. And I leave her at liberty to direct the disposal of the property amongst our children by will, at her death, in [468 such manner as she shall think fit, and should she make no will, I desire that the property existing at her death shall be divided, so far as it may be practicable to do so, equally between my children by her. And I nominate my said wife, Margaret Christiana Dorin, to be the sole executrix of this my will."

The testator at the date of his will had two children only living, namely, the defendants, Charles Alexander Dorin and William James Dorin, and the question is, whether they can take under the description of his children by his wife, they having been born before he had married her.

The general rule that a bequest to the children of the testator, or of any other person, must *prima facie* be taken to mean legitimate children, is not and cannot be disputed. Whether illegitimate children can take under that description, must depend upon the language of the will itself, or upon that language as interpreted by surrounding circumstances; for in order to ascertain what the testator meant by particular words, it is proper for the court, as far as possible, to put itself in the position of the testator, and from that position and the surrounding circumstances, to ascertain and interpret the language of his will. It is necessary, therefore, in order to ascertain what this testator meant by

(¹) 1 V. & B., 422.

9 ENG. REP.

(²) 2 D. M. & G., 702.

"our children" and "my children by her," to look at the situation of the testator when he made his will.

He had been a civil servant in India, and had, no doubt, gone to that country at an early age. He had married a Miss Patton in 1823; by her he had two sons, both of whom had died before the date of the will, one without issue, and the other leaving an only son, the defendant Arthur Frederick Dorin, who was born in 1846, and who was consequently heir-at-law and sole next of kin of the testator. The first wife of the testator, having been with him in India, appears to have returned to England, leaving the testator there, in or shortly before 1850, and soon after that the testator began a cohabitation with the plaintiff, who was then the widow of a Captain Twentyman, and he continued that cohabitation in India till his final return to England in 1858, and the result of that connection was the birth of the defendant Charles Alexander Dorin in 1855. The plaintiff, with 469] her child by the testator, *came to England in the early part of 1858, and was soon afterwards followed by the testator, who then finally took up his abode in this country. Upon his return he lived with his first wife at Chepstow for some months, and he continued substantially to live with her up to the time of her death, in 1863, though in the latter part of her life he spent the greater part of his time with the plaintiff, with whom he always continued his connection from the time of his return to England, successfully concealing it from his wife up to a very late period, when the discovery of the intimacy is stated, as might have been expected, to have greatly embittered the latter days of her life. A second child of this illicit connection, the defendant William James Alexander Dorin, was born in 1861, and the testator's first wife having died in April, 1863, he married the plaintiff on the 29th of April, 1864, and his will, which I have now to construe, was made the day after that marriage, namely, on the 30th of April, 1864.

It is clearly proved in the cause, and was fully admitted by Mr. Pearson, as counsel for the grandson, that the testator always acknowledged the two defendants, who were his illegitimate children by the plaintiff, as his children. He had them, in fact, baptized as such. This appears by the affidavit of Mr. Bonus, a Roman Catholic priest, who baptized the children. He states that, according to the rules and practice of the Roman Catholic Church, illegitimate children cannot be baptized and registered in their father's name without his consent; that he was acquainted with the testator and with the plaintiff, and was aware that they had

cohabited together for some time, but had not then been married, and that the testator gave him a written authority to register the children in his name, and that subsequently the testator had frequently acknowledged that he was the father of Charles Alexander Dorin and of William James Alexander Dorin, and made no concealment of the fact. Then he proves the extracts from the register of baptisms at the Roman Catholic Church, Charles Alexander Dorin having been baptized on the 30th of November, 1858, and W. J. A. Dorin on the 26th of July, 1861.

Then there is the affidavit of Mr. Peter Wood and Mr. Wharton Wood, who say they were intimately acquainted with the testator *from the time of his return from [470 India until his death, and they attended the plaintiff professionally upon the birth of W. J. A. Dorin, and that the testator always acknowledged both the children to be his own, and treated them in all respects as though they had been his legitimate issue. Mr. Duval also testifies to the fact that the testator treated both the children as though they had been his legitimate issue, and always acknowledged them to be his, and treated them with great affection; and evidence quite as strong in support of these children having been acknowledged by the testator as his own is given in the affidavits of Mr. Salter and Mr. Miller.

Under these circumstances, what did the testator mean by the expressions, "our children" and "my children by her?" It cannot for a moment be doubted, and indeed it was fairly admitted by Mr. Pearson, that he must have intended the two illegitimate children he already had by the plaintiff. The intention, then, being clear, it is the duty of the court to carry that intention, which, as Sir Thomas Plumer said, is the polar star of construction, into effect, if it can do so without infringing any principle or settled rule of law. It was argued that, since the testator had, by marrying the mother of these children, put himself in the position of possibility of having legitimate children by her, his will must necessarily be construed as having such children only in his contemplation; but such a construction would, in my opinion, be a violation of his language, which to my mind plainly points to existing and not to future children, though future children might well be included in the gift; and, considering the number of years the connection with the plaintiff had continued, and that no child had been born for nearly four years, it is most improbable that he had future children in contemplation, and all but impossible that he had such children exclusively in view.

The law is clearly settled that existing illegitimate children may take under the description of children whenever it can be ascertained that it is intended that they should do so. The great leading authority on this subject is *Wilkinson v. Adam* ⁽¹⁾, which is the one principally referred to in the argument on both sides. In that case, J. Wilkinson by 471] his will devised certain estates "to *the use and behoof of the child or children which I may have by Ann Lewis (who now lives with me), to be divided equally between them, share and share alike, and his, her, or their heirs forever." The three judges who sent their opinion in that case to the Lord Chancellor stated ⁽²⁾: "With respect to the three children who were born before the making of the will, the depositions prove most abundantly that they had then acquired the reputation of being the children of the testator by Ann Lewis, and thinking, for the reasons above given, that they were the intended objects of the testator's bounty, we think that they are intended to take the real estate under the will itself, without the aid or explanation of any other papers. It has been argued, though not much pressed, that this devise applies only to future illegitimate children, and is therefore void; but, looking to different parts of the will, we think it clearly appears (if that were necessary) that the testator had in his actual contemplation the illegitimate children who were then born, as well as those whom he might afterwards have by Ann Lewis. It was also urged that, as the testator republished his will after the death of his wife, and when the event of his marrying Ann Lewis was thereby brought within his own power, it is fairly to be presumed that under the description of his children by Ann Lewis he meant such children as he might have by her if he should afterwards marry her; but we think that in the construction of this devise the intention of the testator is to be collected from the state of things at the time when he made his will, not when he republished it; and we also think that if the alteration which took place in the interval between the making and republishing his will were taken into the account, enough would still remain to show that his illegitimate children by Ann Lewis were the objects whom he had in view."

Then, Lord Eldon says ⁽³⁾: "In all the cases that I have seen having relation to this question, the illegitimate children, if they were to take, must have taken, not by any demonstration arising out of the will itself, but by the effect of evidence *dehors*, read, or attempted to be read, with a

⁽¹⁾ 1 V. & B., 422.

⁽²⁾ 1 V. & B., 450.

⁽³⁾ 1 V. & B., 462.

view to establish, not out of the contents of the will but by something extrinsic, who were intended to be the devisees; and if my judgment upon this case *is supposed to [472 rest upon any evidence out of the will except that which establishes the fact that there were individuals who had gained by reputation the name and character of his children, that conclusion is drawn without sufficient attention to the grounds on which the judgment is formed; my opinion being, that, taking the fact as established that there were children who had gained the reputation of being his children, it does necessarily appear on the will itself that he intended those children. If that principle is just, and this case falls within its reach, all the cases cited are inapplicable to this."

It is said that the case of *Beachcroft v. Beachcroft* (1) is no longer law; but I do not agree with that. Sir Thomas Plumer, V.C., says in that case (2): "In construing a will, the intention is the polar star, and to discover that, the words and context of the will must be considered; but if there is a latent ambiguity, evidence is admissible to show who the testator was in the habit of considering in the character described in his will. I know of no rule which prevents illegitimate children claiming under a class or description as well as any other stranger. Such children are not prohibited from taking, as by the civil law, and I see no reason to prevent them taking under a general description. It is immoral to become the father of such children, but having them, it is a duty to provide for them; it would be an aggravation of the father's fault not to do so, and, indeed by several statutes, a putative father is compellable to provide for them."

In *Lepine v. Bean* (3), the testator, William Bean, gave his real and personal estate to trustees on trust to pay the income to his "dear wife Margaret Bean" for life, provided she should so long continue his widow and unmarried, and after her death, or second marriage, upon trust to divide the estate between all his children in equal shares. The testator was not married to Margaret Bean, but he had a wife named Elizabeth Bean living; he had had no children by her, and had always lived apart from her, and she was seventy years of age. Margaret Bean, on the contrary, had always lived with the testator, and was recognized as his wife; and he had had four children by her, two of whom had died before the date of the *will; one was then [473 alive, and the fourth was born afterwards. These children were all baptized in the name of the testator, and were

(1) 1 Madd., 480.

(2) 1 Madd., 439.

(3) Law Rep., 10 Eq., 160.

always known by his name. There the Master of the Rolls held that Margaret Bean was entitled to the income of the estate for life if she continued unmarried, and after her death the estate would devolve on the child of the testator and Margaret Bean who was living at the date of the will.

Crook v. Hill (*) was a case upon appeal from a decision of Vice-Chancellor Stuart. There the testator gave certain leasehold estates in trust for his daughter Mary, the wife of his son-in-law, John Crook, for life, and after her death for such of her children as she should appoint by will, and in default of appointment, for her children who should attain twenty-one. The testator's daughter Mary had, with his consent, gone through the ceremony of marriage with John Crook, who had been her deceased sister's husband. There were two children of this marriage born before the date of the will, who were recognized as his grandchildren, and at the time of making the will the testator's daughter was *enceinte* of another child who was born after the testator's death. The Lords Justices held (reversing the decision of Vice-Chancellor Stuart), that the two eldest children were entitled to take under the gift to children, but gave no opinion as to whether the child born after the date of the will could also take. The decision was affirmed by the House of Lords (*).

I may also mention my own decision in the recent case of *In re Brown's Trust* (*). In that case a fund was given by the testator to trustees to pay the dividends to his daughter for life, and then to transfer the capital equally amongst all the children of his daughter, whether by her present putative husband or by any other person whom she might marry. The testator's daughter had been living, with his knowledge, with a gentleman to whom she was afterwards married, and she had one son by that person, who was born four years before the date of the will, and was known by the testator to be illegitimate, and acknowledged by him as his grandson. I held in that case that the illegitimate son was entitled absolutely to the capital. These authorities clearly establish 474] that illegitimate *children may take under the description of the children of a particular person when they have acquired the reputation or character of being so, and the court is satisfied of the intention of the testator that they should take. Both these requisites are, in my opinion, completely fulfilled in the present case, and I am therefore of opinion that the defendants, who are the illegitimate chil-

(*) Law Reports, 6 Ch., 311.

(*) Law Rep., 6 H. L., 265.

(*) Law Rep., 16 Eq., 239.

dren of the testator by the plaintiff, answer the description of "our children" and "my children by her," that is, the plaintiff, his wife.

But it was contended by Mr. Pearson that the effect of giving the property to the two children would be to exclude any legitimate children of the testator's marriage with the plaintiff; but that would not have been so, for there is no rule which prevents illegitimate and legitimate children taking together as a class where it is intended that they should do so. In this case the words of the will are sufficient to include the future children, and they might therefore have taken if there had been any.

In the case of *Wilkinson v. Adam* (¹), the judges said this: "It has been urged against this construction of the devise in favor of the illegitimate children, that, whatever the intention of the testator might be, it was at least a possible event that the testator might survive his wife and marry Ann Lewis, and have children by her; in which event those legitimate children would answer the description of the testator's children by Ann Lewis, and must necessarily take under the will; and that it is an established and inflexible rule of law that legitimate and illegitimate children cannot take together under the general description of children. We will take the former part of this proposition to be true, and we think it is so. It was possible that the testator might outlive his wife, and marry Ann Lewis, and have legitimate children by her: the words of the devise are large enough to include such children; and there appears no express intention to exclude them, though probably the testator had them not in contemplation. We incline to think, therefore, that such children would take under the devise; but the conclusion drawn from thence, that under the circumstances of this case the illegitimate children cannot take with them, is not, as we think, well founded. We think that the illegitimate children *take, because they were clearly meant; and [475 that if illegitimate children of the description above mentioned would also take, it is because the words are large enough to reach them, and the testator expressed no intention to exclude them, though he did not contemplate their existence. When born they would answer the description of his children by Ann Lewis; and being born in marriage, though after the will, the devise would as to them be free from all legal objection."

They then refer to *Cartwright v. Waudry* (²) and *Kenebel v. Scrafton* (³), to show that a contrary doctrine is not estab-

(¹) 1 V. & B., 454.

(²) 5 Ves., 530.

(³) 2 East, 530.

lished by those cases, and they then say ('): "But if it is an established and inflexible rule that legitimate and illegitimate children can in no case take together under the description of children, we should rather be disposed to say, in the present case, that legitimate children could not take, notwithstanding the generality of the words, than that illegitimate children should be excluded, to the disappointment of the clear and manifest intention of the testator. It is observable that in the present case there are no legitimate children to contend with the illegitimate; but we have reasoned it on the supposition that there were both; as much of the argument was founded on the possibility of that event."

In *Owen v. Bryant* ('), Lord Cranworth says: "I reject the notion of there being a rule that illegitimate children cannot, under any circumstances, participate with legitimate children in the benefit of a gift or bequest to children generally;" and in *Hill v. Crook* ('), before the House of Lords, Lord Chelmsford says: "I know of no objection in law to a gift to children with a clear intention that it shall apply to existing illegitimate children, being so applied, although after-born illegitimate children must be excluded, and the gift be extended to future legitimate children."

I consider, therefore, that I am warranted by authority, as I think I am clearly by principle, in saying, as I do, that the future children of the testator and the plaintiff, if there had been any, would have been included in this gift.

476] *There must, therefore, be a declaration that the two infant children are the objects of the power of appointment given to the plaintiff, and that they take as the children of the testator by her in default of her executing the power. A contrary intention would leave these children, who are clearly shown to have been the primary objects of the testator's affection, destitute, and would also have the effect of making him die intestate as to the *corpus* of the estate, which it is quite clear he did not intend to do.

Solicitors for the plaintiff: Messrs. *Freshfields & Williams*.

Solicitor for the defendants: Mr. *J. B. Batten*.

(') 1 V. & B., 457.

(') 2 D. M. & G., 702.

(') Law Rep., 6 H. L., 278.

[Law Reports, 17 Equity Cases, 517.]

V.-C.M., Feb. 14, 1874.

*WILSON V. THORNBURY.

[517]

[1871 W. 251.]

*Production of Documents—Comparison of Handwriting—Checks—Signatures
alleged to be Forgeries.*

In a suit in which the genuineness of the signature of a testator to a certain document was one of the issues to be tried, the defendant was ordered to produce on affidavit any checks in his possession signed by the testator between specified dates. The defendant produced a great number of checks, stating in his affidavit that they were all the checks in his possession signed by the testator, but that he had other checks drawn on the testator's bankers, which he did not produce because they were forgeries:

Held, that the plaintiffs were not entitled to any further particulars, or to production of the checks alleged to be forged.

Quare, whether a document required only for comparison of handwriting is a relevant document which a defendant is bound to specify or produce.

THIS was an adjourned summons, upon the application of the plaintiffs, to consider the sufficiency of an affidavit of the defendant David Featherby Thornbury as to the documents in his possession or power relating to the matters in question in this cause, pursuant to an order dated the 5th of December, 1873.

The bill was filed by William Wilson and Mary Ann, his wife (formerly Mary Ann Cook), against the representatives of David Thornbury, the testator in the pleadings mentioned, claiming to be entitled to a piece of land and the house built thereon, the money for building which was alleged to have been given to the plaintiff Mary Ann Wilson by the testator; or that she might be *declared entitled to the sum of [518 £500, which was so alleged to have been given for the purpose of erecting such house.

The plaintiff Mary Wilson was formerly the wife of W. Cook, deceased, and she and her husband resided with the testator, the plaintiff acting as the testator's housekeeper. The case made by the bill was, that the testator had taken over from W. Cook a farm occupied by him, and was indebted to W. Cook, in respect of the farming stock and other matters connected with the farm, in a sum of about £1,400. That £900 of this money had been secured to W. Cook by the testator's bond, which had been paid by his representatives since his death, and that the testator had signed the following document, dated the 12th of September, 1864, which accounted for the remaining £500:

"Memorandum, that I have this day received from Mr. Hunt and Mr. Cook the sum of £500, the said sum to be paid

by me into the bank for the purpose of building or buying a house for the said W. Cook. I also agree to pay him £5 per cent. interest on the said sum."

The defendants gave an entirely different account of the transactions and dealings between the testator and W. Cook, alleging that the plaintiffs' statements were incorrect; and they also averred that the signature to the memorandum of the 12th of September, 1864, was a forgery.

The plaintiffs desired to inspect checks and documents signed by the testator, for the purpose of comparing the handwriting, and by an order made in Chambers on the 5th of December, 1873, the defendants were ordered to file a full and sufficient affidavit, stating whether they, or either of them, had in their possession or power any and what checks drawn by David Thornbury, the testator in the pleadings named, between the years 1861 and 1870 inclusive, and the defendants were ordered to produce for inspection such documents, except such of the same, if any, as they, or any or either of them, might by affidavit object to produce.

The affidavit of the defendant David F. Thornbury, the son of the testator, was to this effect: "I have in my possession or power the checks drawn by David Thornbury, the testator, between the years 1861 and 1870 inclusive, of which 519] a list is *contained in the schedule hereto. And I further say that I have not now, and never had, in my possession, custody, or power, any check or checks drawn by D. Thornbury between the years 1861 and 1870, other than and except the checks set forth in such schedule. I have in my possession other checks drawn upon the bankers of the testator, but the signatures to them are forgeries, and therefore I do not produce them." The schedule contained a list of about 130 checks.

Mr. Cotton, Q.C., and Mr. Gardiner, for the plaintiffs: We submit that under the order for the production we have a right to see all the checks purporting to be signed by the testator. The defendant refuses production of some on the ground that they are forgeries. The bankers must have believed them all to be genuine signatures when they paid the money; but even if they should turn out to be forgeries, it may be of the greatest importance to us, for the purpose of ascertaining the genuineness of the signature to the particular document impeached, that we should see all the signatures purporting to be by the testator. The defendants do not actually accuse us of committing forgery in respect of these checks, and we might prove upon the evidence of the alleged forgeries that, at any rate, the crime of forgery

does not attach to us. If they say that the order for production of documents does not include the checks alleged to be forgeries, we ought to have another order to include what we are justly entitled to. We are entitled to every document ever signed by the testator relating to the matters in question in the suit.

This lady having now married a second time, and her husband being a very respectable man, it is of the highest importance that her character should be cleared from the imputation cast upon her by the defendants, and every document which can in any manner serve to discover the truth ought to be produced.

Mr. *Glassey*, Q.C., and Mr. *Hemming*, for the defendants : The order made upon the defendants was, that they should state whether they had in their possession any and what checks drawn by the testator between the years 1861 and 1870 inclusive, and that they should produce such documents, except such as they *might by affidavit object [520 to produce. In answer to this, we say that we have produced all the checks signed by the testator between the years 1861 and 1870 ; but the checks which have forged signatures attached to them are not checks signed by the testator, but they are checks signed by some other person, consequently they do not come within the terms of the order. The question, whether the particular memorandum of the 12th of September, 1864, is a forgery or not, is an issue in the cause, and the plaintiffs have no right to introduce a number of other issues as to whether other checks are forgeries. It is an entire error to suppose that a plaintiff is entitled, for the purpose of comparing handwriting, to have production of every document signed by the person whose handwriting is in dispute ; and still less is he entitled to production of documents whose genuineness is disputed. Upon the examination of witnesses orally, under the 15 & 16 Vict. c. 86, the mere circumstance of a document being put into a witness' hands by the party examining him in chief, for the purpose of verifying the handwriting, does not entitle the other side to inspect the document : *Lord v. Colvin* ('). By the 27th section of the Common Law Procedure Act (17 & 18 Vict. c. 125), it is enacted that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses ; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the

(1) 5 D. M. & G., 47.

writing in dispute. If we were at the hearing—and in this case the witnesses will be examined orally—a document not proved to the satisfaction of the judge to be genuine could not be submitted to the witnesses. It is denied that these checks are genuine, and the judge could not try that issue. It stands to reason that for the purpose of proving a signature to be genuine it must be compared with a signature admitted to be genuine, not with a forged or disputed signature. The effect of producing the checks alleged to be forged would be to raise an issue upon every doubtful signature, and have evidence produced before the hearing to prove whether it is genuine or not. Surely the defendants are not to be subjected to that. One issue of forgery is 521] enough to try. We have already produced *130 checks admitted to be genuine, and certified to be so by an expert. These checks extend to a time long before and after the date of the document alleged to be forged, and there are ample means of deciding the question. The idea of using a disputed document to prove handwriting is contrary to every principle of evidence. Moreover, this question has been already decided, for when the production of documents was sought by the plaintiffs, your honor refused to make an order for production of all the documents asked for, and it was only by something like consent that the order was made in this limited form for production of the checks between 1861 and 1870. This order we have strictly fulfilled. The other checks are not documents relevant to the question at issue, in the sense that they are documents proper for production in the suit.

Mr. *Cotton*, in reply.

SIR R. MALINS, V.C.: The case is this: The plaintiff, Mary Ann Wilson, who is now the wife of Mr. Wilson, was housekeeper to the testator, David Thornbury. She alleges that her master gave her certain property. She says he was indebted to her former husband, Mr. Cook, in a sum of £500, and some arrangement was made that she was to have a house built for her instead of receiving the money; and that this arrangement was carried out on the 12th of September, 1864, when the testator signed the following document: "Memorandum, that I have this day received from Mr. Hunt and Mr. Cook the sum of £500, the said sum to be paid by me into the bank for the purpose of building a house for the said W. Cook. I also agree to pay him £5 per cent. interest on the said sum."

If the signature of the testator to that memorandum is genuine, then there can be no doubt the plaintiff will have

made out her case ; but it is alleged by the defendants to be a forgery. They accuse the plaintiff, therefore, of committing a forgery. It is of the highest importance that the truth should be ascertained. The plaintiff has now married again, and her husband is a butcher in the city of Lincoln, and it is, therefore, an important question of character. I should have been well pleased if Mr. Thornbury, *though [522 entertaining a belief that the woman has supported her demand by forgery, had produced the documents, and had done all in his power to assist in ascertaining the truth. I think, as this is a matter of character, I should, in his place, have said, "You may see all the checks in my possession if there is any probability of the truth being thereby discovered." He has, however, produced a bundle of about 130 checks, which are admitted to be genuine ; but then he says : "I have in my possession other checks drawn upon the bankers of the testator, but the signatures to them are forgeries, and therefore I do not produce them." He does not say that these checks are forged by the plaintiff, but only that they are forgeries. I can see plainly that their production may be of great importance, because it is possible that the defendant may be mistaken in thinking they are forgeries, and they may turn out to be genuine. The bankers, at any rate, seem to have acted upon them, and to have paid them, believing them to be genuine ; and though upon examination they may now believe the checks to be forgeries, they might not be able, upon cross-examination, to substantiate that allegation. Therefore the production of these checks may be of the greatest importance to the plaintiff, and I should be pleased if no objection were raised to their production ; but this has not been acceded to, and the question has now been argued, and I must decide the rights of the parties.

The question rests upon a broad and general principle that every one has a right to the production of all documents relating to the matters in question in the suit, and it is said that these checks do relate to the matters in question in the suit. But if this argument were valid, all documents relating to the estate of the testator which he has signed may be ordered to be produced for comparison of signature. I am not quite satisfied that the order I have already made for production could be supported as an adverse order, but I am satisfied there have been produced a sufficient number of checks for comparison in order to ascertain the genuineness of these documents. It appears that Mr. Netherclift, the expert, has been called in, and having examined a great

number of the checks, he has declared that those which the defendant has consented to produce are all genuine, but it is said that he considers the other checks forgeries. The 523] documents now produced are *documents both before and after the date of the memorandum, and I cannot help thinking the plaintiff has had inspection of a sufficient number already to settle the question upon the genuineness of this document; but what I have now to decide is, whether the plaintiff, as a matter of right, is entitled to call for the production of these checks, which are said to be forgeries; and I cannot see that she is. The section of the Common Law Procedure Act referred to enacts that "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses." But it is said these are not admitted, but proved to be inadmissible, and therefore that they could not be used as evidence of handwriting. I think that would be so. Therefore, if the defendant says they are not in the handwriting of the testator, they must be proved to be so before they can be used. If the bankers say they are not in his handwriting, they may be asked, "Did you pay the checks, and do you now believe them to be his signature?" Then they would state why they had altered their opinion. This course could not be taken without the production of the checks alleged to be forgeries. Therefore it is, as I said, of the greatest importance to the plaintiff that they should be produced. But still the question remains, whether, at this stage of the cause, I can order production. If I do not, the cause will come to a hearing without such production. Still, I do not think myself warranted in making the order; and I decide in this manner with satisfaction, because it would be laying down a rule that everything a man had ever signed should be produced in such cases; and secondly, the object may, I think, be attained by giving notice to the defendant to produce at the hearing such documents as may be required; then, if they are not produced, it will be a circumstance against him. Therefore, on the whole, I come to the conclusion that I cannot order these documents to be produced.

As to the question of costs, I shall reserve that until the hearing, and if it turns out then that these documents are of use, I shall deal with the costs in a different manner from what I should now do.

Solicitors for the plaintiff: Messrs. *Swann & Co.*

Solicitors for the defendants: Messrs. *Collier-Bristowe, Withers & Russell.*

[Law Reports, 17 Equity Cases, 546.]

V.-C.M., March 25, 1874.

*HULL V. CHRISTIAN.

[546]

[1861 H. 160.]

Will—Construction—Annuity to Trustee—Gift coupled with Duty.

A gift of an annuity to a trustee, so long as he should continue to execute the office of trustee:

Held, to determine on the cesser of active trusts by the payment of the whole of the trust property to a person absolutely entitled, without a devolution of the office of trustee on any other person.

THIS was a petition by the plaintiff in the suit for payment out of court of a fund standing to the credit of the cause.

The suit was instituted in the year 1861 for the administration *of the estate of the plaintiff's great-aunt, Sarah [547 Rowe, who died in 1847, and by her will, which was dated the 20th of July, 1841, after directing the payment of her debts, funeral and testamentary expenses out of her personal estate, and bequeathing certain legacies and annuities, amongst which was an annuity of £100 to the defendant William Wareing (whom she also appointed one of her trustees) so long as he should continue to execute the office of trustee under her will, gave all her property, both real and personal, to her trustees upon certain trusts, under which, in the events which happened, the plaintiff became absolutely entitled beneficially on attaining her age of twenty-one years, which event took place on the 14th of August, 1873.

The residuary estate of Sarah Rowe had been from time to time paid into court to the credit of the cause as it was realized, and, subject to certain allowances made for the maintenance of the plaintiff during her minority, and to the payment of such annuities as remained subsisting, including that of Mr. Wareing, had been accumulated.

By an order of the 19th of March, 1868, made on further consideration, it was, amongst other things, ordered that a sum of £3,333 6s. 8d. should be set apart to answer the annuity of Mr. Wareing. There was no other annuity now subsisting, but Mr. Wareing was still living.

The petition asked that this fund of £3,333 6s. 8d. might be paid out to the plaintiff together with the other funds in court.

Mr. Glasse, Q.C., and Mr. North, for the petitioner: The plaintiff is now entitled to receive the testatrix's estate, and the trusts of the will have entirely ceased. Mr. Wareing's annuity has consequently expired also.

Mr. Cotton, Q.C., and Mr. Cozens-Hardy, for Mr. Wareing : The annuity is not given for Mr. Wareing's trouble in executing the trusts of the will, and is independent of any active duties he might have to perform. He continues to be a trustee till his death, or till some other person has been appointed in his place and on his retirement. The question, moreover, has been adjudicated upon by the order on fur-548] ther consideration directing the setting *apart of the £3,333 6s. 8d. at a time when all active duties as trustee had practically ceased. Even in *Baker v. Martin* ⁽¹⁾, where the annuity was expressly stated to be for the annuitant's trouble, the duty of showing affirmatively that the duties of the trusteeship had ceased was thrown upon the party claiming under that supposition.

Mr. Glasse, in reply, referred to *Henrion v. Bonham* ⁽²⁾, and said that the *ratio decidendi* of *Baker v. Martin* was that there were assets outstanding.

SIR R. MALINS, V.C.: I am very sorry that the petitioner should think it worth while to disturb the arrangement made by the order of the 19th of March, 1868. But still, however wealthy she may be, she is entitled to have her rights determined, and I have to decide the question whether the annuity has ceased or not.

The annuity was given to Mr. Wareing so long as he should continue to execute the office of trustee. He executed the office from 1847 till the present time, when every trust has come to an end. There is no ground for any suggestion that there is any other trust property than that represented by the fund in court, and the trusts are entirely at an end. Now, what is the meaning of the expression? Surely from its very words it implies remuneration of service to be rendered, and when the trouble ceases the remuneration must also cease. I must, therefore, come to the conclusion that the annuity was to continue so long only as Mr. Wareing should continue to have the trouble of executing the trusts of the will. Mr. Cotton admits that if he had resigned the trusteeship the annuity must have ceased. But another way of terminating the trusteeship was by the cessation of the duties of the trustee.

Therefore, though I am sorry that the question has been raised, the order must be according to the prayer of the petition.

Solicitors : Messrs. Norris, Allens & Carter ; Mr. Worthington Evans.

⁽¹⁾ 8 Sim., 25.

⁽²⁾ Dru., 476.

[Law Reports, 17 Equity Cases, 549.]

V.-C.B., March 6, 1874.

*WILLIAMSON V. WILLIAMSON.

[549]

[1868 W. 132.]

*Lessor and Lessee—Underlease—Covenant not to assign or underlet without License—
Like Provisions.*

Where a lessee subject to a covenant not to assign without the lessor's consent, having obtained such consent, agreed to grant an underlease to contain the like provisions as the lease:

Held, that in the covenant in the underlease against assignment the original lessor was the person whose consent should be required.

ADJOURNED summons raising a question upon the frame of a clause contained in a draft underlease which was being settled in Chambers.

By indenture of lease dated the 20th of April, 1861, Viscount Sidmouth demised unto H. H. Williamson (since deceased) certain mines of coal and ironstone for a term of forty years from the 29th of September, 1860. The lease contained a proviso that if the rents or compensations, or any part thereof respectively, should have been unpaid for sixty days after the days of payment (the same having been first demanded in writing), and no sufficient distress be found on the demised premises to answer such arrears, "or if the lessee or lessees, or any of them, should at any time or times thereafter during the said term set, let, or part with possession of the said premises thereby demised, or any part or parts thereof, or transfer the lease" (now being stated) "for all or any part of the term thereby granted to any person or persons whomsoever, without the consent in writing of the said Lord Sidmouth, his heirs or assigns, for that purpose first had and obtained, save and except to a wife, child or children, or to a partner or partners," or in case the lessee or lessees, should be adjudged bankrupt, &c., it should be lawful for the said Viscount Sidmouth, his heirs or assigns, to re-enter upon the demised premises and take possession thereof, and also to work and win and get the mines and minerals thereby demised, and sell and convert the same to and for his, her, or their own use and benefit, and from thenceforth the term of forty years, and all right and interest thereby granted or demised, or intended *so to be, and every clause, covenant, and agreement [550] therein contained should cease, determine, and be absolutely void to all intents and purposes whatsoever except for the

purpose of recovering arrears of rent and compensation for any breach of the covenants, provisions, or agreements therein contained. The lease also contained a covenant by H. H. Williamson, the lessee, not during the said term to set, let, or part with the possession of the said premises, except as aforesaid, without the license or consent of the said Viscount Sidmouth, his heirs or assigns, in writing.

H. H. Williamson died on the 3d of December, 1867, and his will was proved in June, 1868, by John Henshall Williamson, his sole acting executor.

On the 17th of June, 1871, Lord Sidmouth granted to J. H. Williamson a license to underlet to George Baddeley certain parts of the property comprised in the lease, for any term of years short of the whole term created by the lease, but it was declared by the license that it should not authorize any further letting or assigning, or other parting with the possession of the lands thereby licensed to be sub-let, or any part thereof, without such consent as was required by the lease with respect to assigning and underletting of the lands thereby leased.

On the 21st of July, 1871, J. H. Williamson, after obtaining the consent of Lord Sidmouth, entered into an agreement with George Baddeley, by which he agreed to grant to him an underlease, which was to be in all respects similar to that granted by Lord Sidmouth, of a portion of the mines comprised in the lease from Lord Sidmouth to H. H. Williamson, for the term of twenty-nine and a half years from the 23d of March, 1871, at the rents and royalties therein mentioned, with a proviso.

"That in such underlease shall be contained the like provisions, conditions, and stipulations, in all respects, as were contained in the said recited indenture of lease, except the covenant on the part of the lessee to leave a barrier between the mines thereby demised and the mines under the adjoining lands."

It was also provided by this agreement that the contract thereby entered into, and the underlease to be granted in pursuance thereof, should be subject to the consent of the 551] Court of Chancery in *the suit of *Williamson v. Williamson* (a suit instituted by J. H. Williamson for administration of the estate of H. H. Williamson), and that J. H. Williamson should use his best endeavors to obtain such consent.

In March, 1872, Baddeley agreed to sell his interest in the mines to one Anderson, who, in November, 1872, entered into an agreement for the sale of his interest to the Wedg-

wood Iron Company, the license of Lord Sidmouth having been obtained by Baddeley for these assignments.

In pursuance of the agreement of the 21st of July, 1871, a draft underlease was prepared by the solicitors of J. H. Williamson, and forwarded for approval to the solicitors of Baddeley, by whom it was returned approved. In this draft lease the name of Lord Sidmouth (his heirs and assigns) was inserted in the proviso for re-entry and the covenant against assignment as the person whose consent in writing was required.

In July, 1872, the Chatterley Iron Company agreed to purchase all the interest of J. H. Williamson in the mines and premises, subject to the agreement for granting a lease to Baddeley. This contract was confirmed by an order in the suit dated the 2d of August, 1872, and completed by a conveyance dated the 21st of May, 1873; both contract and conveyance being subject to the agreement with Baddeley of the 21st of July, 1871.

The draft of the proposed underlease was forwarded to the solicitors of the Chatterley Iron Company, by whom the clause relating to assignments and underlettings was altered, by making it necessary for Baddeley to obtain the consent in writing of the Chatterley Iron Company ("the lessors, their successors, or assigns") to any assignment or letting of the premises, and not that of Lord Sidmouth, as was provided by the draft underlease forwarded by J. H. Williamson to Baddeley.

Baddeley's solicitors objected to this alteration, and, on the other hand, the Chatterley Iron Company wrote that they "declined to be bound by the terms of a draft lease alleged to have been submitted by Williamson to and approved by Mr. Baddeley, without notice to them as purchasers after their purchase contract had been confirmed, and to which draft they were no parties."

After some further correspondence, a summons was taken out *by the Chatterley Company to proceed upon the [552 order by which the underlease was directed to be settled by the judge in Chambers.

The summons had been adjourned into court upon the question of the frame of the clause against assignment.

Mr. Kay, Q.C., Mr. E. R. Cooke, and Mr. Whitehorn, for Baddeley, contended that the name of Lord Sidmouth, and not that of the sub-lessors, as the person whose consent was necessary to any assignment or underletting, was alone to be inserted in the proviso. To make the consent of the sub-

lessors necessary would be imposing an additional restriction which they were not entitled to require.

Mr. *Joshua Williams*, Q.C., and Mr. *Everitt*, appeared for the Wedgwood Iron Company, to whom, with Lord Sidmouth's consent, Baddeley had assigned his interest under the agreement with J. H. Williamson, but were not heard.

Mr. *Eddis*, Q.C., Mr. *Chitty*, Q.C., and Mr. *Whitehead*, for the Chatterley Iron Company, contended that they were entitled to the same control over their sub-lessees as was given to Lord Sidmouth over his lessee by the original lease. Lord Sidmouth was not a party to this contract, and though it was not suggested in this particular case that he would collude with the sub-lessees against the sub-lessors, he might not have the same means as the sub-lessors of judging as to the advisability of any proposed assignment, and the insertion of their names, so as to give them the right of veto, was necessary to protect them against the risk of forfeiture. The meaning of the proviso for inserting the like provisions, &c., was that, as in the covenants for payment of rent, and other provisions, the names of the sub-lessors should be substituted for that of the original lessor, and this view was borne out by the practice of conveyancers, who, in settling underleases, made the consent of the sub-lessors necessary: *Jarman's Bythewood* (¹); *Davidson's Precedents* (²).

Mr. *Chisholm Batten* appeared for the plaintiff, J. H. Williamson, but took no part in the argument.

553] *SIR JAMES BACON, V.C.: Nobody can have more respect than I have for the valuable assistance which is afforded to the profession generally by the precedents contained in Mr. Jarman's and Mr. Davidson's books. But what I have to carry out in this instance is a contract between parties; and it is impossible that any contract on the part of these lessors can make them usurp Lord Sidmouth's rights or take his place.

I can see no ground whatever for the contention which has been raised on their part. Lord Sidmouth, being the owner of this property, exercising a paramount right, leases to Williamson, and says: "You shall not assign or underlet to anybody without my consent." Then Williamson goes and asks somebody to take an underlease of part of the premises. How can that possibly deprive Lord Sidmouth of his power over the property, or give that power to anybody else?

Williamson, having got Lord Sidmouth's consent, agrees to give Baddeley an underlease upon the same terms as those

(¹) Vol. iv., p. 573.

(²) Vol. v., p. 176.

upon which Lord Sidmouth had leased to him, one of which is that "you shall not underlet without my" (Lord Sidmouth's) "consent." Of course, then, the underlessee cannot assign or underlet without Lord Sidmouth's consent, and that he should be entitled to treat with a stranger, with the consent of Williamson only, would be inconsistent with the nature and genius of the transaction.

Then it is said that the underlessee, if he is bound by the contract to get Lord Sidmouth's consent, is bound also to get that of the company (i. e., Williamson). But for that contention I can see no ground whatever. It would be adding a new term to the contract. It would be compelling the underlessee to get the company's consent, whereas all he had stipulated to do was to get Lord Sidmouth's. Thus, to insist upon the underlessee getting the company's consent would be not only beyond but contrary to the contract, because the only stipulation as to assignment into which the underlessee entered was, that Lord Sidmouth's consent should be obtained. Not only is there no stipulation for the consent of Williamson or his assigns to any transfer, but there is no necessity for it, because the whole property is bound and *protected by the stipulation that there shall be no [554 underlease except that which Lord Sidmouth consents to.

Solicitors: Messrs. *Lewis, Munns & Longden*; Mr. *Worthington Evans* for Messrs. *Hand, Blakiston & Everett, Stafford*; Messrs. *Wedlake & Letts*.

[Law Reports, 17 Equity Cases, 556.]

V.-C.B., March 10, 1874.

*LANCEFIELD V. IGGULDEN.

[556

[1870 L. 116.]

Administration—Marshalling Assets—Specific Devise—Residuary Realty—Deficient Estate—Contribution.

In the administration of the estate of a testator whose personal assets are deficient, specifically devised estates are not liable to contribute towards meeting the deficiency until the residuary real estate has been exhausted.

FURTHER consideration.

George Lancefield, by his will, dated the 24th of November, 1864, after various specific devises and legacies, directed his trustees to stand possessed of his freehold building yards and hereditaments in Broad Street, Northgate, Canterbury, and all his estate and interest in his stone, brick and lime yards and business premises, in trust for the plaintiff for the term of

his natural life, and after his death upon certain trusts for the benefit of the plaintiff's children. The testator also directed that, subject and without prejudice to the life estate of his mother therein, the trustees should stand possessed of his messuage and premises and land at Wingmore, in Kent, in trust for the plaintiff, his heirs and assigns, forever. And subject to the life estate of his mother in the residue of his freehold and leasehold messuages, lands, and hereditaments, the trustees of the will were directed to stand possessed of 557] the residue of, and all his *estate not thereinbefore disposed of in, his freehold and leasehold messuages, lands, and hereditaments, in trust for his sister Eliza Lancefield, her heirs, executors, administrators, and assigns; and as to all the residue of his personal estates and effects not thereinbefore disposed of, subject to the payment thereof of his debts and funeral and testamentary expenses, the testator gave and bequeathed the same unto Eliza Lancefield absolutely.

The testator died on the 17th of February, 1868.

The plaintiff, who was a specific devisee under the will (as already stated), claimed also to be a creditor of the testator for a sum of £400, for work and labor, and for bricks and material supplied, and filed this bill for an account and payment of what was due to the plaintiff and all other creditors of the testator, and for administration of testator's real and personal estate.

The personal estate was insufficient for payment of debts, and the bill alleged that the defendants had sold a portion of the property specifically devised for the benefit of the plaintiff and his children, and applied the proceeds in payment of the testator's debts.

Accounts and inquiries were directed by the decree made at the hearing, including an inquiry what real estate the testator was seised of or entitled to at the time of his death, distinguishing such parts as were given or devised by name from those parts which the testator directed his trustees to stand possessed of, as "the residue of, and all his estate not thereinbefore disposed of in, his freehold and leasehold messuages, lands, and hereditaments."

The plaintiff had carried in his claim as a creditor of the testator for £401 14s. 8d., but the claim (with the exception of £24 12s. 8d.) was disallowed by the chief clerk, and a balance found due from him to the estate upon investigation of a counterclaim by the executors of £62 6s. 4d.

The case now came on upon further consideration, the two questions being, 1, whether the specifically devised estaets

were liable to contribute ratably with the residuary real estate to meet the deficiency of personal estate; 2, the costs of the plaintiff's claim as a creditor which had failed.

Mr. *Kay*, Q.C., and Mr. *G. W. Collins*, for the plaintiff, contended that the deficiency of the personal estate must be made *good out of the residuary real estate before re- [558 sorting to the estates specifically devised, which from the nature of the gift were intended to be taken without the burthen of the debts: *Tombs v. Roch* (*).

Mr. *Miller*, Q.C., and Mr. *Ince*, for the defendants: Before the Wills Act (1 Vict. c. 26) every gift of real estate, whether in terms specific or residuary, was in fact specific; and since that act, although there has been some difference of opinion, it is now settled that every devise of real estate, though in terms residuary, is in fact specific; and that the specifically devised estates are liable to contribute *pari passu* with the estate included in the residuary devise to the payment of debts for which the personal estate is deficient: *Edwards v. Johnson* (*); and although a different opinion was expressed by Vice-Chancellor Kindersley in *Dady v. Hartridge* (*), that opinion has not been followed: *Pearmain v. Twiss* (*); *Clark v. Clark* (*); *Hensman v. Fryer* (*); *Gibbins v. Eyden* (*). It will be said that the decision in *Hensman v. Fryer* was mistaken, and has not been followed: *Collins v. Lewis* (*); *Dugdale v. Dugdale* (*); but the only part of Lord Chelmsford's decision which was questioned was the direction that the specific devisees should contribute ratably with the pecuniary legatee, and not the part on which we rely, that a residuary devise of real estate remains specific notwithstanding sect. 24 of the Wills Act.

Upon the question of costs, the plaintiff ought not, from filling the position of devisee as well as that of creditor whose claim has failed, to be in any better position than any outside creditor coming in to prove, and liable to pay the costs of a claim which is disallowed.

Mr. *Kay*, in reply: *Dady v. Hartridge* and *Brownson v. Lawrance* (*) are distinct *authorities that real [559 estate included in a general residuary gift is liable for payment of debts before real estate included in a specific devise. In *Collins v. Lewis* (11) Vice-Chancellor Stuart said: "The decision in the case of *Hensman v. Fryer* is clearly a mis-

(1) 2 Coll., 490.

(2) 1 Giff., 22.

(3) 1 Dr. & Sm., 236.

(4) 2 Giff., 130.

(5) 34 L. J. (Ch.), 477.

(6) Law Rep., 3 Ch., 420.

(7) Law Rep., 7 Eq., 371.

(8) Ibid., 8 Eq., 708.

(9) Ibid., 14 Eq., 234.

(10) Ibid., 6 Eq., 1.

(11) Ibid., 8 Eq., 1.

taken decision; and I must therefore decline to follow it." And in *Dugdale v. Dugdale* ⁽¹⁾ Vice-Chancellor Malins says: "The point as to marshalling the deficiency between the legacy and the real estate was decided in *Hensman v. Fryer*, under a misapprehension as to the effect of the decision in *Tombs v. Roch* ⁽²⁾, and I must refuse to follow it. The court is not bound to follow a decision even of the Court of Appeal if clearly erroneous."

We do not deny that personal estate is liable before real estate for payment of debts, but a residuary devise being a sort of dragnet to sweep in everything that is left undisposed of, there is no such particular intention in favor of the residuary devisee as there is in favor of the specific devisee.

Mr. Miller: The decision in *Brownson v. Lawrence* ⁽³⁾, that a specific devise of part of a mortgaged estate, the other part being left to pass by the general residuary gift, is of itself an expression of intention that the part which passes by the residuary gift shall be primarily liable to payment of the whole of the mortgage debt in exoneration of the part specifically devised, has been questioned, and was not treated as a binding authority in *Gibbins v. Eyden* ⁽⁴⁾; *Sackville v. Smyth* ⁽⁵⁾.

SIR JAMES BACON, V.C.: The case of *Tombs v. Roch*, according to my notion, states the real rule according to which a testator must be considered to desire the fulfilment of all the provisions of his will according to their apparent purport, and that a specific devise expresses an intention on his part that the particular devisee should enjoy the specified individual portion of the property which has been devised to him. No principle of justice demands, nor is there any countenance given by the cases to the proposition, that 560] specific devisees *shall contribute *pari passu* with residuary devisees to the payment of debts.

When the personal estate has been exhausted the residuary real estate is bound to contribute towards payment of the testator's debts, and it is not until the residuary real estate has proved insufficient that the specifically devised estates become liable. The distribution must take effect on this principle. As to the costs, it would not be just to make the plaintiff pay any, but he will not have any in respect of his claim as a creditor.

Solicitors: Messrs. *Monckton, Long & Co.*; Mr. *J. Henry Jones*.

⁽¹⁾ Law Rep., 14 Eq., 234.

⁽²⁾ 2 Coll., 490.

⁽³⁾ Law Rep., 6 Eq., 1.

⁽⁴⁾ Law Rep., 7 Eq., 371.

⁽⁵⁾ Ante, p. 153.

[Law Reports, 17 Equity Cases, 578.]

C.J.B., March 2, 1874.

Ex parte SOUTHAM. In re SOUTHAM.* [578]*Bill of Sale—Validity—Defeasance or condition—Registration—Possession—Bills of Sale Act, 1854 (17 & 18 Vict. c. 38), s. 2.*

A bill of sale of furniture was given to secure the payment of £250 and interest, the money being made payable on demand. In default of payment on demand the mortgagee was empowered to take possession. The bill of sale was registered within the proper time. There was a prior parol agreement, not appearing in the bill of sale, that the debt should be paid off by small weekly instalments. The mortgagor was adjudicated a bankrupt, but before the adjudication was made the mortgagee had taken possession:

Held, that this parol agreement amounted to a defeasance or condition within the meaning of sect. 2 of the Bills of Sale Act, 1854; and that, as the agreement was not registered, the bill of sale was void as against the trustee under the bankruptcy.

THIS was an appeal from a decision of the judge of the Manchester County Court.

On the 4th of April, 1873, T. W. Southam, a commission agent at Manchester, was adjudicated a bankrupt upon a petition presented on the 3d of April. The act of bankruptcy alleged had been committed on the 25th of March.

In the year 1869 the bankrupt purchased of his uncle, Mr. Edward Southam, some household furniture for £250. He was unable to pay the price at once, and he gave his uncle a bill of sale of the furniture to secure the price. This bill of sale was dated the 14th of August, 1869, and was expressed to be made between the bankrupt of the one part, and Edward Southam of the other part. By it, in consideration of £250, due by the bankrupt to Edward Southam, the bankrupt assigned his household furniture and all other goods, chattels and effects in and about his dwelling-house to Edward Southam absolutely, subject to a proviso making void the assignment on payment of the £250, with interest, on demand. It was also provided that after default in payment, Edward Southam might enter and take possession of the property, and sell the same. There was also a covenant to pay the £250, with interest, on demand. The evidence in the case showed, in the opinion of the Chief Judge, that prior to the execution of the bill of sale a verbal agreement had been come to between the parties that the bankrupt should pay the £250 off [579] by weekly instalments of £1 or £1 10s., and that if he did this the security should not be enforced. The bill of sale was registered on the 3d of September, 1869, but no notice

of the parol agreement appeared on the register. Some of the instalments were paid by the bankrupt. In April, 1871, Edward Southam took possession of the property, but withdrew upon the bankrupt giving him further security for the balance then due. On the 3d of April, 1873, Edward Southam again took possession of the property. The same day a receiver was appointed under the bankruptcy petition, who took possession of the bankrupt's property, but after Edward Southam had entered. The furniture was afterwards sold by the trustee, and the purchase-money, £106 11s. 10d., was paid into court. An issue was directed to try the question whether the trustee or Edward Southam was entitled to it. The judge decided that the money formed part of the bankrupt's estate. Edward Southam appealed.

The ground of the decision was this: that because the parol agreement for payment by instalments did not appear in the bill of sale as registered, the bill of sale was void under sect. 2 (1) of the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36).

Mr. *De Gex*, Q.C., and Mr. *Robertson Griffiths*, for the appellant: As possession was taken under the bill of sale before the adjudication, and without notice of any act of bankruptcy, registration was unnecessary, and sect. 2 does not apply. At any rate the parol agreement is not such a defeasance or condition as is aimed at. No one could be misled into giving credit to the bankrupt through looking at the bill of sale as registered. If such a person had been aware of the parol agreement, he would have found 580] that *the bankrupt was in fact in a more favorable position than the bill of sale had led him to suppose. He could not, therefore, have been misled to his injury. *Bramwell v. Eglinton* (*) and *Robinson v. Collingwood* (2) do not apply.

Mr. *Little*, Q.C., and Mr. *Hamilton Humphreys*, for the trustee, were not called upon.

(1) Sect. 2: "If such bill of sale shall be made or given, subject to any defeasance or condition or declaration of trust not contained in the body thereof, such defeasance or condition or declaration of trust shall, for the purposes of this act, be taken as part of such bill of sale, and shall be written on the same paper or parchment on which such bill of sale shall be written, before the time when the same, or a

copy thereof, respectively shall be filed, otherwise such bill of sale shall be null and void to all intents and purposes, as against the same persons and as regards the same property and effects, as if such bill of sale, or a copy thereof, had not been filed according to the provisions of this act."

(2) 5 B. & S., 39.

(3) 17 C. B. (N.S.), 777.

SIR JAMES BACON, C.J. : I think that there is no ground for objecting to the judgment of the County Court Judge. The case comes as distinctly within the spirit, the intention and the meaning, as it does within the very words of sect. 2 of the Bills of Sale Act. The object of the act was to protect creditors in their dealings with their debtors, to enable them to know whether the persons with whom they are dealing are entitled to credit. The case is plain in its facts. Because the bankrupt was unable to pay down cash at once for the furniture which he had agreed to buy, the parties came to an agreement for the payment of the price by very easy instalments. The bill of sale which was afterwards given contains no reference whatever to that agreement. Mr. Robertson Griffiths said that he did not care whether that agreement was entered into before or after the execution of the bill of sale. In my opinion it makes all the difference whether it was before or after. That creditors are prejudiced by the agreement is upon the very surface. Suppose a person about to deal with the debtor had looked at the register, he would at once, if he was a prudent man, have said, "I cannot give you credit, because you have executed a bill of sale of your furniture." The answer to this would have been, "True, I have done this, but the bill of sale was given upon the condition that, if I pay the weekly instalments of the debt regularly, it shall not be enforced." The act says that if there be any condition it shall be written upon the instrument which is registered, otherwise that instrument shall be void as if it had not been registered at all. If this condition had been written in the bill of sale which was registered, the creditor could have inquired whether the instalments had been duly paid. To such an inquiry the answer *would have been, "I [581 have only partially paid that agreement, and I have given additional security for the debt." In my opinion the case comes, as the County Court Judge has decided, distinctly within the provisions of the act. The condition is undoubtedly one the performance of which might have been enforced in a court of equity; whether it could have been enforced in a court of law may be doubted after the decision in *Bramwell v. Eglinton* ('). But in that case the condition could, no doubt, have been enforced in a court of equity, though upon what terms it is unnecessary to inquire. But the decision there does not affect the principle of my present decision. Upon the evidence which has been given, it is clear that there was an agreement for purchase

(') 5 B. & S., 39.

and sale of this furniture, and for payment by instalments, before the bill of sale was talked of. The decision of the County Court Judge was right, and I cannot disturb it. The appeal must be dismissed with costs.

Solicitor for the appellant: *Mr. A. D. Smith.*

Solicitors for the respondent: *Messrs. Johnson & Weatheralls, agents for Mr. Storer, Manchester.*

EQUITY CASES

(INCLUDING BANKRUPTCY CASES)

BEFORE

THE MASTER OF THE ROLLS,

THE

VICE-CHANCELLORS,

AND THE

CHIEF JUDGE IN BANKRUPTCY.

[Law Reports, 18 Equity Cases, 1.]

M.R., March 2, 1874.

*SALE V. LAMBERT.

[1

[1873 S. 110.]

Sale of Real Estate—Memorandum of Agreement—Vendor not named, but described as Proprietor—Signature by Auctioneer—Statute of Frauds.

Upon a sale by auction of real estate in lots the particulars stated that the sale was by direction of the proprietor; but the name of the vendor did not appear. A memorandum indorsed on a copy of the particulars was signed by the purchaser of one of the lots, and by the auctioneer on behalf of the vendor:

Held, that the vendor was sufficiently described, and that the memorandum was sufficient to satisfy the requirements of the Statute of Frauds: and specific performance of the agreement decreed at the suit of the purchaser.

THIS was a suit by a purchaser of real estate against the vendor for specific performance.

On the 19th of July, 1872, the defendant, James Lambert, caused certain real estate (to which the defendant was entitled in fee simple) to be put up for sale by auction in six lots, according to printed particulars and conditions of sale, which stated *that the property was to be sold "by direction of the proprietor," but did not contain the name or any other description of the vendor. The plaintiff, William Sale, became the purchaser of lots 3, 5, and 6, at sums amounting to £1,242, and a memorandum was indorsed on a copy of the particular and conditions of sale, and signed by the plaintiff and by Mr. George Jackson, the auctioneer at the

1874

Sale v. Lambert.

M.R.

sale, on behalf of the defendant. The memorandum was as follows :

"Memorandum of agreement on sale of an estate by auction at Baldock on the 19th day of July, 1872, as follows:

"I do hereby acknowledge that Mr. William Sale, by Mr. Thomas Veasey, his solicitor, has been this day declared the purchaser of lots 3, 5, and 6, mentioned and described in the particular hereto annexed, at the sum of £1,242, and that he has paid a deposit of £186. And I do hereby agree that the vendor on his part shall in all respects fulfil the conditions of sale mentioned in the said particular.

"Witness my hand this 19th day of July, 1872.

	£	s.	d.
"Purchase-money	1,242	0	0
"Deposit paid	186	0	0

"Remains due	1,056	0	0
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"George Jackson.

"Approved by me,

"Wm. Sale."

"July 19, 1872."

The bill was filed to enforce the agreement for sale. The defendant (who did not deny that he was the vendor) raised three defences, of which it is only necessary to mention the second, namely, that there was no memorandum in writing of the agreement such as to satisfy the requirements of the Statute of Frauds.

The *Solicitor-General* (Sir R. Bagallay), and Mr. Charles Walker, for the plaintiff.

Mr. Southgate, Q.C., and Mr. Daunev, for the defendant: The written memorandum does not show who the vendor is, and therefore is insufficient: *Wheeler v. Collier* (1); *Jacob 3] v. Kirk* (2); * *Williams v. Lake* (3); *Williams v. Byrne* (4); *Skelton v. Cole* (5); *Dart's Vendors and Purchasers* (6). In *Hood v. Lord Barrington* (7) the particulars stated that the property had belonged to Admiral F., deceased, and that the sale was by direction of his executors, and that was held sufficient. But the office of executor is one known to the law, and clearly defined, and though the executors' names did not appear, the maxim, *Id certum est quod certum reddi potest*, applied. Here the sale is said to be by direction of the "proprietor." That word is a vague and popular expression, and not a sufficient description of the vendor.

(1) Mood. & M., 123.

(2) 2 Mood. & Rob., 221.

(3) 29 L. J. (Q.B.), 1.

(4) 9 Jur. (N.S.), 363.

(5) 1 De G. & J., 587.

(6) 4th Ed., p. 202.

(7) Law Rep., 6 Eq., 218.

SIR G. JESSEL, M.R., after disposing of the first objection taken by the defendant, continued :

The second objection is one of general importance. It is said that there is no memorandum in writing of the agreement such as to satisfy the Statute of Frauds because the vendor's name does not appear. That is very important, because it is not the usual practice to put the vendor's name in the particulars of sale, and I do not remember having ever seen particulars of sale in the form in which the vendor says they ought to be. However, the question is, what is the law on the subject? Mr. Dart states it thus: "It appears to be now clearly settled that in order to satisfy the statute *both* parties should be specified, either nominally or by a sufficient description." With that statement I do not quarrel; the only question is, what is a sufficient description?

It is not necessary to decide this point here. The question is, can you find out from the memorandum who the vendor is? The property is stated to be put up for sale "by direction of the proprietor." Therefore the proprietor is the vendor, and is referred to as being the person who employs the auctioneer to sell. What more do you want? It is said that the term "proprietor" is not a sufficient description; I think that it is an excellent description; certainly in acts of Parliament the proprietor or owner is frequently mentioned as the person on whom notices are to be served, and the like.

*If authority is wanting for this decision, I think *Hood* [4 v. *Lord Barrington* (¹)] is in point: but I do not think that any authority is really wanted. I am clear that on this memorandum the vendor is sufficiently described, and that it is a good memorandum within the statute.

His honor then overruled the remaining objections which had been raised on behalf of the defendant, and made the usual decree for specific performance, and ordered the defendant to pay the costs up to the hearing.

Solicitors: Mr. S. W. Johnson; Mr. Balderston.

(¹) Law Rep., 6 Eq., 218.

[Law Reports, 18 Equity Cases, 4.]

M.R., April 17, 1874.

POTTER V. DUFFIELD.

[1870 P. 124.]

Sale of Real Estate—Memorandum of Contract—Name of Vendor—Statute of Frauds.

In order to satisfy the requirements of the Statute of Frauds, the note or memorandum of an agreement for the sale of real estate must contain either the names of the contracting parties or such a description of them that there cannot be any fair dispute as to their identity.

The term "vendor" is not of itself a sufficient description of one of the contracting parties.

Real estate was put up for sale under particulars and conditions of sale which did not disclose the vendor's name, but stated that B. was the auctioneer. The purchaser of one of the lots signed a memorandum acknowledging his purchase; and B. signed at the foot of this memorandum another in these terms, "Confirmed on behalf of the vendor. B.":

Held, that the memorandum did not sufficiently show who the vendor was; and a bill for specific performance of the contract for sale was dismissed.

ON the 20th of August, 1869, certain real estate was put up for sale by auction in four lots, under printed particulars and conditions of sale, which did not disclose the vendor's name, and in some places spoke of "vendors" in the plural although for the most part the word "vendor," in the singular, was used. It appeared therefrom that Messrs. Duffield & Bruty acted as the vendor's solicitors, and that Messrs. Beadel were the auctioneers.

5] *Mr. John Rogers, the plaintiff's agent, attended the sale, and was declared to be the highest bidder for lot 2, and paid the deposit; and he and Messrs. Beadel signed the following memorandum, which was endorsed on a copy of the particulars and conditions of sale:

"Memorandum.

"I John Rogers, of Maldon, do hereby acknowledge myself to be the purchaser of lot 2 of the property described in the foregoing particulars, for the sum of £200, and having paid the auctioneer £20 as a deposit and in part payment of the purchase-money, I hereby bind myself, my heirs, executors, administrators and assigns, to pay the balance of the purchase-money, and to complete the purchase, subject and according to the foregoing particulars and conditions of sale. Dated this 20th day of August, 1869.

"Amount of sale	£200	0	0
Deposit	20	0	0

Balance	£180	0	0
John Rogers.			

Confirmed on behalf of the vendor,
Beadels,
Per N. J.,
Aug. 20th, 1869."

No abstract was sent in accordance with the conditions of sale, and on the 5th of October, 1869, the plaintiff's solicitors wrote to Messrs. Duffield & Bruty asking to be furnished with the proper abstract. Mr. Duffield, a member of that firm, replied, on the 6th of October, that certain mortgagees of the property refused to concur in the sale, and it was therefore useless to send an abstract; and he offered to return the deposit. Mr. Duffield also subsequently offered to pay the plaintiff any costs he had incurred up to that date. The plaintiff refused to accept these offers, and instituted this suit against Mr. Duffield, alleging that he was the vendor, and praying for specific performance of the contract.

Mr. Duffield, by his answer, submitted that there was no memorandum in writing of the alleged contract such as to satisfy the Statute of Frauds; he denied that he was the vendor of the real estate in question, and stated that the vendor was in fact one *William Polley. William Polley was entitled in fee simple to the equity of redemption in the property, subject to three mortgages. The third of these three mortgages was vested in Mr. Duffield, who had under it a power of sale over the property.

The cause now came on to be heard. The evidence was conflicting. William Polley, in an affidavit filed on behalf of the plaintiff, alleged that he had never in any way authorized the sale. On the other hand, one of the firm of Messrs. Beadel, who was a witness for the defendant, stated that he received instructions from Mr. Bruty (of the firm of Duffield & Bruty) on behalf of William Polley; and he referred to his books, in which all matters relating to the sale were entered under the heading, "*Re Mr. William Polley's Estate.*" One of such entries was of an interview which he had on the 20th of August, 1869, with Mr. Polley and Mr. Duffield as to the reserved prices of the lots at the proposed sale. By an affidavit in reply Polley denied that any such interview took place.

Mr. Rooth (Mr. Roxburgh, Q.C., with him) for the plaintiff: The memorandum is sufficient to satisfy the Statute of Frauds, although the vendor's name does not appear. The vendor is the person who employed Messrs. Beadel as his agents, and there is nothing to prevent our showing by parol evidence who Messrs. Beadel's principal was. In fact the

word "vendor," as used in this memorandum, is as good a description of one of the contracting parties, as the term "executor," which was held sufficient in *Hood v. Lord Barrington* ⁽¹⁾, "proprietor," which was held sufficient in *Sale v. Lambert* ⁽²⁾. The observations of Lord Romilly, in the former case, are strongly in favor of the plaintiff.

He also contended that the evidence showed that the defendant was the vendor.

Mr. *Southgate*, Q.C., and Mr. *Begg*, for the defendant, were not called upon.

SIR G. JESSEL, M.R.: I am of opinion that no contract whatever is proved in this case.

The Statute of Frauds requires that an agreement for the 7] sale *of lands, or some memorandum or note thereof, shall be in writing. The present Lord Chief Justice, in *Williams v. Lake* ⁽³⁾, explains that to mean that the essentials of the agreement must be stated in writing; and amongst the essentials he mentions the subject-matter of the agreement, and the names of the contracting parties. Here we have a contract with one of the contracting parties neither named nor described. I use the word "described" because I think the statement in the judgment in *Williams v. Lake*, that the memorandum ought to contain the names of the parties, must have been made with reference to the particular circumstances of that case. That appears from the terms in which the law is laid down by Sir John Taylor Coleridge in the case of *Williams v. Byrnes* ⁽⁴⁾. He says: "The words require a written note of a bargain or contract, the statute clearly making no distinction between these two words. This language cannot be satisfied unless the existence of a bargain or contract appear evidenced in writing; and a bargain or contract cannot so appear unless the parties to it are specified, either nominally or by description or reference." I take that to mean that the statute will be satisfied if the parties are sufficiently described, so that their identity cannot be fairly disputed. The counsel for the plaintiff contends that you may describe one of the parties as the vendor of the estate; but the statute cannot mean that. It requires the parties to be described in such a manner as that there can be no fair or reasonable dispute as to the person who is selling or buying. I recently held that the description "proprietor" would be sufficient, there being but one person who answered the description. In the same way the estate must be sufficiently described. In some

⁽¹⁾ Law Rep., 6 Eq., 218.

⁽²⁾ Ante, p. 1.

⁽³⁾ 2 E. & E., 349; 29 L. J. (Q.B.), 1.

⁽⁴⁾ 9 Jur. (N.S.), 363.

cases the mere name of the owner may be sufficient, as "A. B.'s estate;" in other cases (as where the same person has more than one estate) you must have some other and more complete description.

In this case what have we? We have a memorandum in which the purchaser first states, in the usual manner, that he has purchased; and then we have these words: "Confirmed on behalf of the vendor, Beadels," Messrs. Beadel being the auctioneers. There is not a syllable in the particulars of sale to show who the vendor is; and in fact, so far from it being clear that there is a single *vendor, in [8 one part the word is "vendor" and in another "vendors," so that it is by no means clear that there are not several persons selling.

That being so, this bill is filed against a gentleman named Duffield, who says, "I never was the vendor." It is not a case in which the defendant admits that he was the vendor and pleads the Statute of Frauds, but it is a case in which he says he was not; and, what is more, I think he has proved that he was not. He is a solicitor, in partnership with a gentleman named Bruty, the firm being Duffield & Bruty. They were the solicitors for a person named Polley. Polley had made two mortgages of the estate for a considerable amount, and he had also obtained a third loan from Mr. Duffield, who, being the third mortgagee and having a power of sale, could have sold the estate. But what he says is this: "My firm, as solicitors for Polley, instructed Messrs. Beadel;" and not only does he say so, but Mr. Beadel says so, and produces his books, in which Polley is described as the owner of the estate, and an interview is mentioned, at which Polley was present and the reserved price was discussed. Again, when we look at the particulars of sale we find Duffield & Bruty named as solicitors to the vendor, which is an odd thing if Duffield alone were the vendor. The whole of the evidence, if it can be gone into at all, appears to show that, whether Messrs. Duffield & Bruty were or were not right in thinking they had Polley's authority, they did think they had Polley's authority, and they did instruct Mr. Beadel to sell on behalf of Polley, and that Mr. Beadel accepted the instructions to sell on his behalf; and therefore, if you could go into the evidence as to the person who is described as vendor by Mr. Beadel, the answer Mr. Beadel would give would be that Polley was that person. But that is exactly what the act says shall not be decided by parol evidence. I should be thrown on parol evidence to decide who sold the estate, who was the party

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In re Mowlem.

M.R.

to the contract, the act requiring that fact to be in writing. I think we could not have a clearer or better illustration of the difficulties which would arise if I were to interpret the statute otherwise, than that in this case I should have to decide on the parol evidence of Mr. Duffield, Mr. Beadel, and Mr. Polley, as to who was in fact the real vendor.

That being so, I think there is no contract such as to 9] satisfy the *statute. It also appears that the plaintiff was informed, before the bill was filed, of the real circumstances of the case, and was told that the mortgagees, whose consent to the sale had been anticipated, and who had given their consent on the very reasonable condition that the estate should be sold so as to pay them off, would not concur in the sale, and the vendor was not able to pay them off. With that the plaintiff does not choose to be satisfied; but having received that information, with an offer for the return of the deposit and his costs up to that time, he then, not only without any evidence in support of the allegation that Mr. Duffield was the vendor, but without any contract which could be supported according to the provisions of the statute, chooses to file his bill. Under these circumstances I must dismiss the bill with costs.

Solicitors: Messrs. *Denton, Hall & Barker*; Messrs. *Duffield & Bruty*.

[Law Reports, 18 Equity Cases, 9.]

M.R., March 3, 1874.

In re MOWLEM.

Devise—Estate Tail—Child en ventre sa mère—Intermediate Rents.

Devise to trustees to the use of the first and other sons of M. in tail male, with a residuary devise. Three months after the testator's death the first son of M. was born:

Held, that the residuary devisees were entitled to the intermediate rents from the testator's death to the birth of the tenant in tail.

JOHN MOWLEM, by his will, dated the 2d of May, 1865, devised certain real estates to trustees to the use of the first and every other son of the testator's nephew, Thomas Joseph Mowlem, severally and successively, according to their respective seniorities of age and priority of birth, in tail male, with divers remainders over, and an ultimate remainder to the testator's right heirs; and the testator gave and bequeathed the residue of his real and personal estate to his trustees upon and for the trusts and purposes in the said will mentioned.

The testator died on the 8th of March, 1868. The said Thomas Joseph Mowlem was then married, and had daughters, but no son. His wife was, however, at that time *enceinte*, and on the 6th of *July, 1868, gave birth to a [10 son, who became the infant tenant in tail of the estate.

The trustees on the testator's death had entered into the receipt of the devised estates.

The question arose who was entitled to the *interim* rents of the estate between the dates of the testator's death and the birth of the child.

Mr. *Fry*, Q.C., and Mr. *Rodwell*, for the infant, submitted that he was entitled to the intermediate rents: In *Goodale v. Garthorne* (*), where a tenant in fee died leaving his wife *enceinte*, and leaving two sisters his co-heiresses at law with defeasible rights, on the birth of a son, who became the absolute heir, he was held to be entitled to the rents that had accrued between the death of the father and his own birth.

Mr. *Southgate*, Q.C., and Mr. *E. S. Ford*, for the trustees, referred to *Richards v. Richards* (*), where it was held that a posthumous heir was entitled to the rents of a descended estate only from the date of his birth, and that the presumptive heir was entitled to the intermediate rents.

SIR G. JESSEL, M.R.: If there had been no residuary devise in this will the heir-at-law would have been entitled to the intermediate rents. As, however, there is a residuary devise, the residuary devisees are entitled, and the trustees who have entered and received the rents are trustees of the rents in question for such residuary devisees. It is singular that such a question should come before the court in the year 1874.

Solicitors: Messrs. *Hedges & Brandreth*.

(*) 2 Sm. & Giff., 375.

(*) Joh., 754.

[Law Reports, 18 Equity Cases, 11.]

M.R., April 16, 1874.

*RICHARDS V. DELBRIDGE.

[11

[1874 B. 18.]

Voluntary Gift—Intended Transfer of Property—Invalid Declaration of Trust.

D., who was possessed of leasehold business premises and stock-in-trade, shortly before his death purported to make a voluntary gift in favor of his grandson E., who was an infant and who assisted in the business, by the following memorandum, signed and indorsed on the lease: "This deed and all thereto belonging I give to E. from

this time forth, with all the stock-in-trade." The lease was then delivered to E.'s mother on his behalf:

Held, that there was no valid declaration of trust of the property in favor of E. *Richardson v. Richardson* ⁽¹⁾, and *Morgan v. Malleon* ⁽²⁾, not followed.

DEMURRER.

The bill, filed by Edward Bennetto Richards, an infant, by his next friend, stated that John Delbridge, deceased, was possessed of a mill, with the plant, machinery, and stock-in-trade thereto belonging, in which he carried on the business of a bone manure merchant, and which was held under a lease dated the 24th of June, 1863.

That on the 7th of March, 1873, John Delbridge indorsed upon the lease and signed the following memorandum:

"7th March, 1873. This deed and all thereto belonging I give to Edward Bennetto Richards from this time forth, with all the stock-in-trade.

"John Delbridge."

That the plaintiff was the person named in the memorandum, and the grandson of John Delbridge, and had then for some time assisted him in the business; that John Delbridge, shortly after signing the memorandum, delivered the lease on his behalf to Elizabeth Ann Richards, the plaintiff's mother, who was still in possession thereof.

That John Delbridge died in April, 1873, having executed several testamentary instruments which did not refer specifically to the said mill and premises, but gave his furniture and effects, after his wife's death, to be divided among his family.

[2] *That the testator's widow, Elizabeth Richards, took out administration to his estate, with the testamentary papers annexed.

The bill, which was filed against the defendants Elizabeth Delbridge, Elizabeth Ann Richards, and the testator's two sons, who claimed under the said testamentary instruments, prayed a declaration that the indorsement upon the lease by John Delbridge and the delivery of the lease to Elizabeth Ann Richards created a valid trust in favor of the plaintiff of the lease and of the estate and interest of John Delbridge in the property therein comprised, and in the goodwill of the business carried on there, and in the implements and stock-in-trade belonging to the business.

The defendants demurred to the bill for want of equity.

Mr. *Fry*, Q.C., and Mr. *Phear*, in support of the demurrer: The memorandum of the 7th of March, 1873, did not operate as a valid gift of the leasehold property to the infant

⁽¹⁾ Law Rep., 3 Eq., 686.

⁽²⁾ Law Rep., 10 Eq., 475.

plaintiff, as it was not an instrument under seal, nor of the stock-in-trade, as there was neither seal nor delivery. The gift was only intended to take effect by transfer; as there was no transfer, the memorandum cannot be converted into a declaration of trust, for a voluntary settlement intended to be effectuated in one manner cannot have effect given to it in another.

This last point is determined by *Milroy v. Lord* (*), followed by *Warriner v. Rogers* (*).

Mr. *W. R. Fisher* (Mr. *Southgate*, Q.C., with him), for the plaintiff: Although there is no equity to perfect an imperfect gift, yet where there is a clear intention to declare a trust of property, the court will hold that an instrument, however informal, constitutes a valid declaration of trust. This appears from many cases, among which may be cited *Ex parte Pye* (*) and *Kekewich v. Manning* (*).

[THE MASTER OF THE ROLLS: That was the law of the court down to the time of *Kekewich v. Manning*.]

The same principle was followed in *Wheatley v. Purr* (*). In **Richardson v. Richardson* (*) a voluntary deed, [13 whereby a donor purported to assign certain specific property and all other her personal estate to B., was held to pass the property in certain promissory notes, not specifically mentioned in the deed, which were found in the donor's possession at her death, though the notes had not been indorsed, and there was no evidence of their delivery to B. This was on the principle that the deed of assignment operated as a complete declaration of trust of all the donor's property in favor of B.

In *Morgan v. Malleson* (*) a memorandum of a voluntary gift in this form: "I hereby make over to M. an India bond, value £1,000," was signed by S., and given by him to M. without handing over the bond. S. died, and the residuary devisees under his will claimed the bond. It was there held by Lord Romilly that the memorandum was a good declaration of trust in favor of M.

It is submitted that there is a sufficient intention shown here, and that a valid declaration of trust has been created in favor of the plaintiff.

Mr. *Fry* was heard in reply on the case of *Richardson v. Richardson*.

SIR G. JESSEL, M.R.: This bill is warranted by the de-

(*) 4 D. F. & J., 264.

(*) Law Rep., 16 Eq., 840.

(*) 18 Ves., 140.

(*) 1 D. M. & G., 176.

(*) 1 Keen, 551.

(*) Law Rep., 3 Eq., 686.

(*) Ibid., 10 Eq., 475.

cisions in *Richardson v. Richardson* and *Morgan v. Malleson*; but, on the other hand, we have the case of *Milroy v. Lord* (¹), before the Court of Appeal, and the more recent case of *Warriner v. Rogers* (²), in which Vice-Chancellor Bacon said: "The rule of law upon this subject I take to be very clear, and with the exception of two cases which have been referred to" (*Richardson v. Richardson* and *Morgan v. Malleson*), "the decisions are all perfectly consistent with that rule. The one thing necessary to give validity to a declaration of trust—the indispensable thing—I take to be, that the donor, or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest."

[4] *The two first-mentioned cases are wholly opposed to the two last. That being so, I am not at liberty to decide the case otherwise than in accordance with the decision of the Court of Appeal. It is true the judges appear to have taken different views of the construction of certain expressions, but I am not bound by another judge's view of the construction of particular words; and there is no case in which a different principle is stated from that laid down by the Court of Appeal. Moreover, if it were my duty to decide the matter for the first time, I should lay down the law in the same way.

The principle is a very simple one. A man may transfer his property, without valuable consideration, in one of two ways: he may either do such acts as amount in law to a conveyance or assignment of the property, and thus completely divest himself of the legal ownership, in which case the person who by those acts acquires the property takes it beneficially, or on trust, as the case may be; or the legal owner of the property may, by one or other of the modes recognized as amounting to a valid declaration of trust, constitute himself a trustee, and, without an actual transfer of the legal title, may so deal with the property as to deprive himself of its beneficial ownership, and declare that he will hold it from that time forward on trust for the other person. It is true he need not use the words, "I declare myself a trustee," but he must do something which is equivalent to it, and use expressions which have that meaning; for, however anxious the court may be to carry out a man's intention, it is not at liberty to construe words otherwise than according to their proper meaning.

(¹) 4 D. F. & J., 264.

(²) Law Rep., 16 Eq., 340, 348.

The cases in which the question has arisen are nearly all cases in which a man, by documents insufficient to pass a legal interest, has said, "I give or grant certain property to A. B." Thus, in *Morgan v. Malleson* ⁽¹⁾ the words were, "I hereby give and make over to Dr. Morris an India bond;" and in *Richardson v. Richardson* ⁽²⁾ the words were, "grant, convey, and assign." In both cases the judges held that the words were effectual declarations of trust. In the former case, Lord Romilly considered that the words were the same as these: "I undertake to hold the bond for you," which would undoubtedly have amounted to a declaration of trust.

*The true distinction appears to me to be plain, and [15 beyond dispute: for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift show an intention to give over property to another, and not retain it in the donor's own hands for any purpose, fiduciary or otherwise.

In *Milroy v. Lord* ⁽³⁾, Lord Justice Turner, after referring to the two modes of making a voluntary settlement valid and effectual, adds these words: "The cases, I think, go further, to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

It appears to me that that sentence contains the whole law on the subject. If the decisions of Lord Romilly and of Vice-Chancellor Wood were right, there never could be a case where an expression of a present gift would not amount to an effectual declaration of trust, which would be carrying the doctrine on that subject too far. It appears to me that these cases of voluntary gifts should not be confounded with another class of cases in which words of present transfer for valuable consideration are held to be evidence of a contract which the court will enforce. Applying that reasoning to cases of this kind, you only make the imperfect instrument evidence of a contract of a voluntary nature which this court will not enforce; so that, following out the principle even of those cases, you come to the same conclusion.

I must, therefore, allow the demurrer; and, though I feel

⁽¹⁾ Law Rep., 10 Eq., 475. ⁽²⁾ Law Rep., 3 Eq., 686. ⁽³⁾ 4 D. F. & J., 264, 274.

some hesitation, owing to the conflict of the authorities, I think the costs must follow the result.

Solicitor for the plaintiff: Mr. T. D. Bolton, agent for Messrs. Hill & Hill, Helston.

Solicitors for the defendants: Messrs. Gregory, Rowcliffes & Rawle, agents for Messrs. Carlyon & Paull, Truro.

[Law Reports, 18 Equity Cases, 18.]

M.R., April 20, 1874.

18]

*JERVIS V. WOLFERSTAN.

[1873 J. 19.]

Trustee and Cestui que Trust—Indemnity—Liability of Executor—Distribution of Residuary Estate with Notice of Remote Liability—Following Assets—Refunding.

A trustee who accepts office at the request of a *cestui que trust* is entitled to be indemnified by that *cestui que trust* personally against all loss which may accrue in the proper execution of the trust.

Notice of a remote contingent liability on the part of a testator is not sufficient to prevent his executor from distributing his residuary estate; and if the executor distributes with such notice, and the liability afterwards ripens into a debt, he will be entitled to call on the residuary legatees to refund.

The executors of a testator had during his lifetime, and at his request, become trustees of a deed, whereby certain shares in an unlimited company were settled on a tenant for life, with remainders over. While the company was a going concern, and believed to be perfectly solvent, they distributed the residuary estate: afterwards the company was ordered to be wound up. Large calls were made in respect of the shares, and the remaindermen all disclaimed:

Held, that the trustees and executors were entitled to be indemnified out of the testator's estate, and to call on the residuary legatees to refund.

A person who has covenanted to bequeath or otherwise provide that a share of his estate shall go to the covenantee fulfils his covenant by bequeathing the share to the covenantee, who then stands in the same position as any other legatee.

The above-mentioned testator had, by the settlement made on the marriage of one of his daughters, covenanted to bequeath or otherwise provide that a certain share of his residuary estate should go to her; and it was by the same settlement agreed that such share should be paid to the trustees and held by them on the trusts of the settlement. The testator accordingly bequeathed the proper share to his daughter, and it was paid by the executors to the trustees of the settlement:

Held, that the trustees were liable to refund equally with the other residuary legatees.

An executor who compels a legatee to refund can recover only the capital sum which he has paid to the legatee, without any intermediate income.

On the 21st of August, 1866, Swynfen Stevens Jervis transferred to Jervis John Jervis and Philip Octavius Jervis 625 fully paid-up shares of £20 each in the Albert Life Insurance Company, an unlimited company; and by an indenture of 19] even date, made *between the same parties, it was declared that J. J. Jervis and P. O. Jervis should stand possessed of these shares upon trust for Catherine Jervis (the

wife of Swynfen S. Jervis) during her life for her separate use, without power of anticipation, and after her death for certain of the children and grandchildren of Swynfen S. Jervis.

On the same 21st of August, 1866, Swynfen S. Jervis made his will, and thereby bequeathed his residuary personal estate to his two daughters, Mrs. Broughton and Mrs. Brackenbury (then Mrs. Wolferstan) and his son Walter Neil Jervis, in equal shares, and he appointed Jervis John Jervis and Philip Octavius Jervis his executors.

Swynfen S. Jervis died on the 15th of January, 1867.

By an indenture dated the 31st of March, 1866, being the settlement made on the marriage of Mrs. Broughton, to which Swynfen S. Jervis was a party, it was agreed and declared that he, the said Swynfen S. Jervis, should and would bequeath by his will, or otherwise provide, that whatever residue of his personal estate should remain at his decease should be equally divided between his children, Mrs. Broughton, Mrs. Brackenbury, and Walter Neil Jervis; and it was thereby also agreed and declared that such share of Mrs. Broughton of the said residue should be paid over by the executors or administrators of Swynfen S. Jervis to the trustees of the settlement, to be held by them upon the trusts thereby declared.

By an indenture dated the 22d of April, 1867 (being the settlement made on the marriage of Mrs. Brackenbury), Mrs. Brackenbury assigned her share under her father's will to trustees (one of whom was P. O. Jervis) upon the trusts thereby declared.

J. J. Jervis and P. O. Jervis, as the executors of the testator, got in his personal estate and paid his debts; and after making such payments there remained in their hands a clear residue of £2,649 12s. 6d. In May, 1869 (having previously issued the usual advertisements for creditors under the statute 22 & 23 Vict. c. 35), they paid over one-third of this sum to the trustees of Mrs. Broughton's settlement, and another third to the trustees of Mrs. Brackenbury's settlement; and they retained the remaining third for the benefit of Walter Neil Jervis, who was then abroad.

*At the time when these payments were made the [20] Albert Company was a going concern, and believed to be perfectly solvent; but the executors were aware that the liability on the shares standing in their names as trustees of the settlement of the 21st of August, 1866, was unlimited, and that such liability might possibly fall on Swynfen S. Jervis's estate.

In September, 1869, the Albert Company was ordered to be wound up, and J. J. Jervis and P. O. Jervis were settled on the list of contributories, and calls to the amount of £6,875 had been made on them in respect of the 625 shares.

After the failure of the company the *cestuis que trust* under the deed of the 21st of August, 1866 (with the exception of Mrs. Jervis, the tenant for life, who had received some dividends on the shares), disclaimed. Mrs. Jervis was willing to contribute her proper proportion of the amount of calls. The one-third share of Walter Neil Jervis in the residuary estate of Swynfen S. Jervis had, with his consent, been applied towards payment of the calls.

This suit was instituted by J. J. Jervis against Mr. and Mrs. Broughton, Mr. and Mrs. Brackenbury, and the trustees of their respective settlements, and Mrs. Jervis, seeking to be indemnified against the calls on the shares to the extent of the sums paid out of Swynfen S. Jervis's estate to the trustees of the settlements, and to obtain repayment from those trustees of such sums.

Mr. *Southgate*, Q.C., and Mr. *W. W. Cooper*, for the plaintiff: All the *cestuis que trust* under the deed of the 21st of August, 1866 (with the exception of Mrs. Jervis) have disclaimed, and there is, consequently, a resulting trust in favor of Swynfen S. Jervis. The plaintiff and his co-trustee became trustees of the shares at the request of Swynfen S. Jervis, who, if he had been living, would have been under an obligation to indemnify the plaintiff and his co-trustee; and his estate is under a like obligation: *Ex parte Chippendale*⁽¹⁾; *Balsh v. Hyham*⁽²⁾; *Phené v. Gillan*⁽³⁾. Although the plaintiff was executor, and himself paid over the residuary estate to the trustees of the settlement, still he was quite right in so doing; the possible liability of the estate in respect of *these shares afforded no ground for the retention of the residue by the executors; and now that the liability has actually ripened into a debt, the executor is entitled to insist on repayment: *Prowse v. Spurgin*⁽⁴⁾.

Mr. *Fry*, Q.C., and Mr. *Speed*, for Mr. and Mrs. Broughton and the trustees of their settlement: There is no case in which an executor has been permitted to recover a fund which he knowingly paid away to the wrong person.

The payment was made to us, not as legatees, but as creditors under the covenant in the settlement. It is true that what the testator covenanted to pay was a share of residue; and the amount to be paid therefore depended on the liabil-

⁽¹⁾ 4 D. M. & G., 19, 54.

⁽²⁾ 2 P. Wms., 453.

⁽³⁾ 5 Hare, 1.

⁽⁴⁾ Law Rep., 5 Eq., 99.

ities of the testator; and if the executor had ascertained the true amount of these liabilities, we might not have had any payment made to us at all; but the executors choose themselves to assess the amount, and how can they now recover it back? They chose to assume that a liability which they knew would not ripen into a debt, and cannot recover from us simply because that anticipation has turned out to be fallacious: *Aiken v. Short* (*).

Again, the plaintiff can be in no better position than the official liquidator of the company would be; and it is quite clear that the official liquidator could not compel us, who are creditors of the testator of equal degree with himself, to refund.

[The MASTER OF THE ROLLS referred to *Hodges v. Waddington* (*); *Taylor v. Taylor* (*).]

The duty of the trustees was to ascertain whether or not their *cestuis que trust* disclaimed. If they had disclaimed before the residue was distributed, the interest of the testator under the settlement might have been sold; and then, instead of being now called on to refund, we should have had a large additional sum paid to us.

Mr. *Bagshawe*, Q.C., and Mr. *Kekewich*, for Mr. and Mrs. Brackenbury and the trustees of their settlement, cited *Grayburn v. Clarkson* (*), as showing it to have been [22 the duty of the executors to sell the testator's interest in the shares.

Mr. *Everitt*, for Mrs. Jervis.

Mr. *Southgate*, in reply: It is incorrect to say that the trustees of Mrs. Broughton's settlement were creditors of the testator. The testator's covenant was to bequeath or otherwise provide; he had a right to choose either alternative; he chose to bequeath, and by so doing satisfied the covenant: *In re Brookman's Trust* (*); and the covenantees are in no better or worse position than any other residuary legatees. That being so, the right of the official liquidator as against them is clear: *Davies v. Nicolson* (*); and the plaintiff is in no worse position than the official liquidator, for the possibility of this liability ripening into a debt was too remote to be considered. Suppose the executors had refused to divide the residue on the ground of this liability, and the residuary legatees had filed a bill to compel them to do so, is it possible to suppose that the court would not have made a decree against them with costs? Then, as to

(*) 1 H. & N., 210; 25 L. J. (Ex.), 321.

(*) 2 Vent., 360.

(*) Law Rep., 10 Eq., 477.

(*) Law Rep., 3 Ch., 605.

(*) Law Rep., 5 Ch., 182.

(*) 2 De G. & J., 693.

ascertaining whether or not the *cestuis que trust* accepted the benefits intended to be conferred on them by the deed, a remainderman cannot be called on to accept or disclaim an interest until the interest comes into possession.

SIR G. JESSEL, M.R.: This case is one which is by no means common, and which, I hope, will not become common. It is a case where the executors of a will now claim as creditors against the estate which they have themselves distributed; and it is so peculiar that it is necessary to state it shortly.

By a deed of settlement of the 21st of August, 1866, Mr. Swynfen Jervis, who was the owner of 625 fully paid-up shares in the Albert Insurance Company (then a going concern, and supposed to be not only solvent but wealthy), made a settlement of the shares, which were then supposed 23] to be of great value, on his wife *for life, with remainder to his children and grandchildren. Mr. Swynfen Jervis made his will on the same day, and made the trustees of the settlement his executors. He died in January, 1867, and the will was duly proved.

By an indenture of settlement made in his lifetime, on the 31st of March, 1856, on the marriage of one of his daughters, now Mrs. Broughton, Mr. Swynfen Jervis had covenanted that he would bequeath by his will, or otherwise provide, that whatever residue of his personal estate should remain at his decease should be equally divided between Mrs. Broughton, Mrs. Brackenbury, and Walter Neil Jervis. By another indenture of the 22d of April, 1867, which was a settlement of Mrs. Brackenbury's share, her one-third share of the residue which she took under Mr. Jervis's will was settled, and got into her trustees. The executors of Mr. Swynfen Jervis, of whom the plaintiff is one, advertised for creditors in the usual way. They found that they had paid all their debts, that they had got rid of all their liabilities except this, that there was a possible liability on the Albert shares, because, though it was a going concern, and believed to be solvent, it might fail; this failure might take place before the remaindermen had become entitled in possession; they would thus have an opportunity of disclaiming, and this would throw back the shares, as regards beneficial interest or liability, on the testator's estate; and in that way there was a possible liability of the testator's estate to the trustees of that settlement—a remote, contingent, unexpected liability; and it is not contended that the plaintiff was not aware that there was such a possibility. There being no debt unpaid, and no present liability, the

executors divided the residue, which then amounted to £2,649 12s. 6d., in shares; they paid one share of £883 4s. 2d., to the trustees of Mrs. Broughton's settlement, and another share of equal amount to the trustees of Mrs. Brackenbury's settlement. Unfortunately, the payments having been made, the Insurance Company failed, and was wound up, and eventually the costs of the liquidation turned out to be exceedingly heavy, and very large calls, amounting to £6,875, were made upon these trustees and executors. Of course, as trustees of the settlement and holders of the shares, they were legally liable to pay this large sum of money.

*The *cestuis que trust* under the settlement, with the [24 exception of the widow (who had received some dividends, and was unable to disclaim) naturally disclaimed, and the result, therefore, was, that under our law there was a resulting trust for the testator's estate. Mrs. Jervis has paid, or is willing to pay, a sufficient contribution; but the result is that the testator's estate is liable for several thousands of pounds, and liable to indemnify these trustees. I take it to be a general rule that where persons accept a trust at the request of another, and that other is a *cestui que trust*, he is personally liable to indemnify the trustees for any loss accruing in the due execution of the trust; and under that doctrine I shall hold that the estate of the testator became liable to indemnify the trustees against the payment of this large sum of money.

That being so, the next question is, How are they to be recouped, if they are entitled to be recouped at all? The only sums remaining to recoup them are these two sums of £883 4s. 2d. paid to the trustees of the respective settlements. These sums were originally undoubtedly part of the testator's estate, and part of the estate which was liable to recoup them, and the question which I have now to try is, whether what has happened has entitled these defendants to retain these moneys, and to leave the trustees to bear the loss personally.

Now, first of all, as regards Mrs. Broughton and those claiming under her settlement, it is said that they are not in possession as legatees at all; that it is not a case in which an attempt is made by a creditor to make a residuary legatee refund, but that it is the case of one creditor attempting to make another creditor refund. The first question which I have to examine is, whether that is a true state of the case as regards the law; and I do not think that it is. The covenant by Mr. Swynfen Jervis was simply that he would be-

queath by will, or otherwise provide, that this share of residue should come to Mrs. Broughton. He did bequeath it by will, and he therefore fulfilled his covenant. The effect of the bequest by the will was to make the lady a residuary legatee, and nothing else, and, consequently, when the trustees of her settlement received it they were simply in the position of a residuary legatee receiving a share of the residue; and if, as residuary legatee, Mrs. Broughton was 25] liable to refund, the liability, in my opinion, *remains. That makes the case of Mrs. Broughton identical with that of Mrs. Brackenbury.

The next question is, Are they liable to refund at all? I take it that no proposition is better settled than that residuary legatees are liable to refund at the suit of an unpaid creditor, and I have already held that the plaintiff and his co-trustee are unpaid creditors.

The only proposition that remains to be examined is this: It is said that, in addition to being creditors, the plaintiff and his co-trustee were also the executors of the debtor, and that, though creditors can obtain an order to refund against residuary legatees, executors cannot, if the executors have paid over the assets with notice of the debt. Now that is undoubtedly good law, but it does not by any means follow that the creditor, as such, has lost his right to recover, because he could not recover in another character, assuming always that he could not recover in that character. It may be quite true that if the suit was brought in the character of executor only, it would be barred; for that reason I will examine in a moment whether it is so barred; but still I do not think that it is at all conclusive, on the question as to the creditor's right to recover, to say that he has done something which would debar him in another character from recovering, he not suing in that other character.

But, is it true that the executor would be barred in a case like this? I cannot find any authority. I have looked through many cases, and I have asked for the assistance of the bar, and I cannot find the rule stated in wider terms than these, that he cannot recover from a legatee a payment made with notice of a debt. Now he certainly had not notice of a debt, for the debt did not exist. The utmost notice that he had was notice of a possible liability—a remote, unlikely liability, but a possible one; and the question therefore remains, whether the notice of a possible remote contingent liability of this kind prevents the executor recovering back the assets, if he had paid them away, when that which was formerly this possible remote liability

becomes a debt? I am not willing to stretch the rule beyond what its terms require, because it appears to me that great inconvenience would arise from so straining or stretching the rule. If it were true that an executor *was disabled [26 from recovering merely because he had notice of such a possible liability, the result would be to throw the great bulk of the estates of testators who had any property into this court—a result certainly not desirable, because it would then be sufficient for an executor to allege as an excuse for not paying any of the legatees, that at some remote period his testator had been a lessee of property, though the property might be of the greatest possible value, though it had been assigned many years before, and there was a good covenant of indemnity by a solvent purchaser. That is a very common case, indeed. But not only would it be a sufficient ground for refusing to pay a legatee, it would be a sufficient ground for refusing to pay anybody anything. The mere fact that the executor had heard (for that is notice) that the testator had formerly been a lessee, would give him any delay he might wish, because he might say that he was prosecuting inquiries as to whether the testator had ever been a lessee of any leasehold property whatever of which he was formerly possessed.

This shows the extreme inconvenience of notice of such a kind of remote contingent liability being held sufficient to make the executor guilty of negligence (for that is what it must come to) in distributing the assets—guilty of wilful negligence, such as to deprive him of any remedy if he were afterwards made personally liable at the suit of the person entitled to enforce that liability. I think the mere statement of such a result shows how dangerous it would be to extend the doctrine to that length, and I am not prepared so to extend it; on the contrary, I would rather encourage executors to distribute the assets as soon as possible, instead of making them liable to such a responsibility if they did not take such superfluous and unusual precautions. I think, therefore, that it would not have been sufficient to prevent the plaintiff, even as executor, from recovering this amount if he had been compelled by a third person to pay it. That being so, I am of opinion that the plaintiff is entitled to recover.

There now remains the question, What is he entitled to recover? I take it that he is entitled to recover what he has paid. It was put to me that that would involve some hardship; but, on the other hand, everybody taking a residue must know that he takes it subject to the testator's liability.

27] ities, and takes the risks of it *afterwards turning out that there are undiscovered liabilities. That has always been the law, and I think there is no unusual hardship in that. On the other hand, it has been thought to be a hardship that a man may not spend the income of what he has been paid, and the doctrine is now established, that if an executor recovers back assets he cannot recover any of the income, but he must take only the capital. Following that doctrine, I shall direct the trustees of Mrs. Brackenbury's settlement to pay £883 4s. 2d. into court, and the trustees of Mrs. Broughton's settlement to pay the like sum into court by a day to be fixed for that purpose.

Then as to the costs, I cannot help seeing that this is a case of very great hardship on all sides. I do not at all blame the trustees of these settlements for bringing this case into court. Points of law of great nicety, and by no means free from difficulty, have been discussed, and I think that they were not wrong in not making the payments without the case being decided; and so far, therefore, from mulcting them in costs, I think they must have their costs. Therefore, when the sums are brought into court, I think that the costs of all parties, as between solicitor and client, should be paid out of the fund, and that the residue should be paid to the plaintiff and his co-trustee, Mr. Philip Octavius Jervis.

Solicitors: Messrs. *Stokes, Saunders & Stokes*; Messrs. *Tucker & Lake*; Messrs. *Few & Co.*; Mr. *J. H. Johnson*.

[Law Reports, 18 Equity Cases, 88.]

V.-C. M., April 17, 1874.

88]

*PERRING V. TRAIL.

[1868 P. 169.]

Mortmain—Charitable Legacy charged on Land—Statutory Exemption from Disability—Power to devise implied from Power to take by Will.

A hospital was empowered by an act of Parliament by which it was incorporated, by will, gift, purchase, or otherwise, to obtain, acquire, hold and retain land for the purposes of the charity; and also by will, gift, purchase, or otherwise, to obtain, acquire, hold and maintain, for the purposes of the charity, any kind of personal estate, including money secured on mortgage or charged on land:

Held, that those words implied a power to devise land for the use of the charity, and, therefore, that where a testator gave certain legacies to this as well as other charities out of a mixed fund of realty and personalty, the charity in question was entitled to receive the legacy in full.

JOHN PERRING, by his will, dated the 28th of August, 1863, gave, devised and bequeathed all his real and personal

estate whatsoever and wheresoever (except any estate vested in him as trustee or mortgagee) to trustees, upon trust that they, when and as they should deem expedient and an advantage so to do, with all the same discretion and authority as an absolute owner, sell his trust estate and effects, and stand possessed of the money to arise therefrom, upon trust thereout, in the first place, to pay all his just debts, funeral and testamentary expenses, and then in payment of legacies to some relatives and connections, and also to several different charities, amongst which was a legacy of £100 to the treasurer for the time being of the Westminster Hospital; and there was a general direction that the several charitable legacies were to be applied by the respective treasurers to the purposes of the respective institutions.

*The testator made some codicils which did not affect [89 the bequest to the Westminster Hospital, and died on the 16th of May, 1867.

The suit was instituted for the administration of the testator's estate, and a decree was made on the 6th of March, 1868; and by the chief clerk's certificate the estate was found to consist of the proceeds of real and personal estate which had been sold and converted, and was represented by a fund in court.

Several of the charities to which legacies had been given were incorporated by act of Parliament, but in respect to all except the Westminster Hospital it was admitted that they were not exempted from the disabilities of the Mortmain Act.

The Westminster Hospital, however, was incorporated by a private act of 6 Geo. 4, c. xx., sect. 1 of which, after constituting the president, vice-presidents, treasurers and governors, for the time being a body politic and corporate for the purposes of the institution or hospital by the name and style of "The President, Vice-Presidents, Treasurers and Governors of the Westminster Hospital," with power to sue in the corporate name, enacted as follows:

"And by the same name shall be able and capable, without incurring the penalties and forfeitures of the Statutes of Mortmain, to hold and retain for the purposes of the said hospital the said hospital or building in and near the Broad Sanctuary aforesaid, and piece of ground there whereon the same stands, and the piece or pieces of land or ground in James Street aforesaid, and by will, gift, purchase, or otherwise, to obtain, acquire, hold and retain for the purposes of the said hospital any manors, messuages, lands, tenements and hereditaments of any kind, name, quality, or sort, either in fee or for terms of life or years, or otherwise

howsoever, so as such manors, messuages, lands, tenements and hereditaments (exclusive of the said hospital at or near the Broad Sanctuary aforesaid, and piece or parcel of ground whereon the same stands, and exclusive of the said pieces or parcels of ground in James Street aforesaid, and also exclusive of the manors, messuages, lands, tenements and hereditaments that may at any time or times after the passing of this act be vested in the said corporation hereby created, or in any trustee or trustees for the said corporation hereby created, by way of mortgage, or upon which any 90] *sum or sums of money belonging to the said corporation hereby created may be charged) do not in the whole exceed the clear yearly value of £20,000 over and above all charges and reprises, computing the same at the rack rent which might have been had or gotten for the same respectively at the time of the attaining or acquisition thereof: And also by will, gift, purchase, or otherwise, to obtain, acquire, hold and maintain for the purposes of the said hospital any kind of personal estate, and any moneys and property of what nature or kind soever, including money secured on mortgage of, or charged upon, any manors, messuages, lands, tenements, or hereditaments.”

The suit now came on for further consideration, the only question to be argued being whether the Westminster Hospital was entitled to receive the legacy in full.

Mr. Glasse, Q.C., and Mr. W. W. Karlake, for the plaintiffs: The question is, whether a gift of land to a charity empowered to hold land is good where the testator is not also entitled to give land to a charity. There is a double disability, and powers such as those in the Westminster Hospital Act only remove the cause of invalidity arising from the disability of the charity, leaving the disability of the testator untouched: *Nethersole v. School for the Indigent Blind* (¹); *Chester v. Chester* (²). Stronger words are necessary to take away the disqualification of a testator: *Robinson v. Governors of London Hospital* (³).

Mr. W. S. Owen, for the defendants.

Mr. Hull, for some of the Charities, and Mr. Cates, for another, admitted that they could not claim exemption from the Mortmain Acts.

Mr. Phear, for the Westminster Hospital: The act incorporating the hospital is so worded as to take away both disqualifications, and there are words in it which quite distinguish it from the cases cited. In the acts incorporating the charities in *Nethersole v. School for the Indigent*

(¹) Law Rep., 11 Eq., 1.

(²) Law Rep., 12 Eq., 444.

(³) 10 Hare, 19.

Blind, and **Chester v. Chester* (¹), there was simply a [9] general power to take personalty by will and a limited power to hold land, without any words having reference to the sources from which it might be derived. It would be absurd to hold that the charity might take land by devise, and yet that no one had the power of devising.

Mr. *Glasse*, in reply: The words of the act must be read *reddendo singula singulis*, so as to avoid the conclusion that it was intended by a mere private act to repeal *pro tanto* the Mortmain Acts.

SIR R. MALINS, V.C.: I agree with Mr. *Glasse*, to a certain extent, that the court ought not to presume an intention to modify or repeal a public act of Parliament by a private one. But words in a private act must receive the same construction as in a public one, and this hospital having had those powers conferred upon it, is entitled to all the benefits arising from a fair construction of the enactment. It is clear that if no one could give any land to the charity by will, it could not take any land by devise, and could never become possessed of any. I think, therefore, that, in order to give the words of the act any effect, I must hold that persons are at liberty to devise land for its benefit. A capacity to take by will conferred upon a charity seems necessarily to empower a testator to give land to it, and though the power is not conferred here in such express terms as was the case in *Robinson v. Governors of London Hospital* (²), I think the words are sufficient.

Solicitors: Mr. *F. H. Jeanneret*; Messrs. *Fladgate, Clark & Finch*; Mr. *Henry Cockle*; Messrs. *Trollope & Winckworth*; Messrs. *Redpath & Holdsworth*.

(¹) Law Rep., 12 Eq., 444.

(²) 10 Hare, 19.

[Law Reports, 18 Equity Cases, 114.]

V.-C.B., March 16, 1874.]

*DAWSON V. SMALL.

[114

[1868 D. 20.]

Will—Charity—Honorary Trust—Gift of Surplus after void Gift.

Testator bequeathed to his executors £600 out of his pure personal estate, upon trust to invest and apply the income in keeping in good repair all the tombstones and headstones of his relatives and himself in G. churchyard, and directed that any surplus that might remain after defraying yearly the expenses as before stated, should be given by his executors every year to poor pious members of the Methodist Society in G. above the age of fifty years:

Held, that the trust to keep the tombstones in repair being honorary only, the whole £800 was well given for the benefit of the Methodist poor, discharged from the obligation of keeping the tombstones in repair.

JOHN SMALL, who died in January, 1867, by his will, dated the 18th of June, 1846, after giving his dwelling-house and other property and cottages at Guisborough to the use of his housekeeper, Sarah Dawson, for her life, gave and devised unto the use of David Baker and Robert Harrison and Sarah Dawson, his housekeeper, their heirs and assigns, forever, all his messuages, lands, tenements and hereditaments situate at Guisborough, and all other his real estates and personal estates, whatsoever and wheresoever situate, and of what nature or kind soever, which he might die possessed of, interested in, or in any way entitled to, and which he had any power to dispose of, either at law or in equity, for payment of debts, funeral and testamentary expenses. After a request to his executors and executrix that if he should die from home his remains might be brought to Guisborough to be buried amongst his friends, and with certain directions for preserving the bones and dust of his ancestors, testator bequeathed £600, arising out of such part of his personal estate as should not be secured upon mortgages or chattels real, or be invested in government securities, to be invested either in the purchase of land in Guisborough or in its near neighborhood; (but should the Statute of Mortmain prevent this), then the said sum of £600 to be invested in government securities, and that the interest, dividends, or rent arising therefrom be forever applied to the following purposes: "1. To keep up in good [115] repair all the tombstones and *headstones of my relations and self in the churchyard of Guisborough, with the wall and iron palisading surrounding the same; likewise the two headstones belonging to my family outside of the said enclosure; and if any of the iron or stonework want repairing that it always be done when wanted, and that all the headstones and tombstones always be kept clean and well painted, and that the letters be recut when growing illegible, and that all weeds and grass be kept from growing in the inside of the said enclosure, and that it be cleaned and scoured twice every year, and that likewise the headstones of my brother J. Small, in Seamer churchyard, and of my cousin R. Wiles, in the same churchyard, and of my cousin Thomas Wiles, in the enclosure of Guisborough churchyard, be kept in order and painted, the same as is directed respecting the others before named. And I hereby direct and desire that any surplus money that may remain after de-

fraying yearly the expenses as before stated, shall be given every year, on the 6th day of September (my birthday), in the vestry belonging to the Wesleyan Methodist Chapel, in this town, to poor pious members of the Methodist Society resident in this town above the age of fifty years, and that the said surplus money be paid by the two society stewards belonging to the said chapel. Should there be more than two society stewards, a leaders' meeting shall be called, to choose two of the number, and whose decision shall be entered in a book to be kept for that purpose, wherein all payments from time to time shall be entered; and I do hereby order that they, the said society stewards for the time being, be the trustees to receive the dividends, rents, or profits arising from the investment of the said £600 sterling hereby bequeathed for that special purpose, and that the two society stewards retain to themselves the sum of £1 each annually as a remuneration for that trouble, and that the said sum of £600 be invested within eighteen months after my decease."

By a codicil to his will, testator directed that the distribution of the surplus interest of the £600 should be made by his executrix, Sarah Dawson, in her dwelling-house, instead of by the chapel stewards, in the Wesleyan Chapel at Guisborough, as directed by the will, the gift of £1 each for the stewards, for their trouble, being revoked.

*A suit having been instituted for administration of [116 testator's estate, a question arose upon further consideration, whether, the prior gift for keeping the tombstones in repair being, upon the authorities, invalid, the gift of the surplus interest of the £600, after satisfying that purpose, failed also.

Mr. *Swanston*, Q.C., and Mr. *J. Cutler*, for the plaintiffs, Sarah Dawson and William Harrison: There is a present immediate gift of £600 for the benefit of the Wesleyan poor, subject only to the condition of keeping in repair the family tombstones. That prior condition being void as a perpetuity and incapable of being enforced, *Rickard v. Robson* (*), *Hoare v. Osborne* (*), *Re Rigley's Trust* (*), the bequest to the Wesleyan poor does not fail from being the bequest of a surplus or residue after a void bequest; but the whole fund is well given for the benefit of the Wesleyan poor, discharged from the honorary obligation of keeping the family tombstones in repair: *Fisk v. Attorney-General* (*); *Sinnett v. Herbert* (*); *Hunter v. Bullock* (*).

(1) 31 Beav., 244.

(2) Law Rep., 1 Eq., 585.

(3) 15 W. R., 190.

(4) Law Rep., 4 Eq., 521.

(5) Ibid., 7 Ch., 232.

(6) Ibid., 14 Eq., 45.

Mr. *Hemming*, for the Attorney-General, also contended that the £600 was well given for the benefit of the Wesleyan poor.

Mr. *Eddis*, Q.C., and Mr. *Torriano*, for the defendants interested in remainder: Where there is a gift for a purpose which is void and incapable of being carried into execution, a gift of the surplus is also void for uncertainty: *Chapman v. Brown* ⁽¹⁾; *Fowler v. Fowler* ⁽²⁾, inasmuch as it is incapable of being ascertained, except by the actual execution of the prior purpose: *Limbrey v. Gurr* ⁽³⁾. Moreover, the whole income would have been exhausted in keeping all the graves mentioned in repair, and therefore any inquiry for ascertaining the amount of surplus would be useless: *Cramp v. Playfoot* ⁽⁴⁾. The case is distinguished from *Fisk v. Attorney-General* and *Sinnott v. Herbert*; as in those cases there was a valid prior gift of the whole fund to trustees to be applied for certain purposes, [17] some of *which were valid and others invalid. We submit, therefore, that the gift wholly fails, and that the £600 falls into the residue.

Mr. *Chitty*, Q.C., and Mr. *Caldecott*, for other parties in the same interest.

SIR JAMES BACON, V.C.: I think this case is governed by *Fisk v. Attorney-General* ⁽⁵⁾, and that the decision in that case not only binds me but guides me to the decision of this case. It has been argued as a distinction that in that case and in some others there has been a gift to individuals. Here the testator disposes of the whole of his estate, names executors, and gives £600, part of his property, to be invested and secured. What is that but a gift to the executors? What are they but trustees under that gift? What difference, I ask myself, can it make that a person is named to have the management and conduct of that gift, and that it is given to be disposed of by the executors of the testator? There is no sort of distinction. The cases that have been referred to, beginning with *Chapman v. Brown* ⁽¹⁾ and *Limbrey v. Gurr* ⁽³⁾, are wholly distinguishable; they are as plain as anything can be. The gift in each of those cases was of surplus. In one case it would be impossible to ascertain what would be required to build the chapel, and unlawful, if it could be ascertained, to apply the surplus for that purpose, and therefore it would be impossible to say that there would be any surplus. The same observation applies

⁽¹⁾ 6 Ves., 404.

⁽²⁾ 38 Beav., 616.

⁽³⁾ 6 Madd., 151.

⁽⁴⁾ 4 K. & J., 479.

⁽⁵⁾ Law Rep., 4 Eq., 521.

in *Limbrey v. Gurr*. The testator intended to dedicate a part of his property to the building of almshouses, and all that was not wanted for building the almshouses was to be given to the inhabitants of the almshouses. If the almshouses could not be built, there would be no persons who could now inhabit them. So in this case the testator sets apart £600 for the charitable purposes which he mentions, one of which is for repairing the tombstones, not saying any thing as to the proportion which should be disposed of in that way, and he gives all the surplus for the poor people attending the Methodist Chapel of which he was a member. Where is the difference? Nothing is required for maintaining the *tombstones; all that there is is surplus. It [118 is exceedingly like *Fish v. Attorney-General* (*), as I understand that decision, and in the present case, as I understand the rule, the obligation, if it may be so called, is discharged. It is an obligation either to be performed or not, as the persons to whom the custody of the money is given think fit, and all that is yielded from the annual income of the devised estates goes therefore to the charitable purposes which the testator has pointed out. The obligation to keep up the tombstones is merely honorary; but the obligation to give all that is not applied for the purposes first mentioned in favor of these poor people, is by no means honorary; it is a trust that must be executed.

In my opinion, consistently with all the cases referred to, and being wholly unable to find any distinction between *Fish v. Attorney-General* and the present case, the gift of £600 is a good charitable legacy.

Solicitors: Messrs. *Pitman & Lane*, agents for Messrs. *Weatherill & Lloyd, Guisborough*; Messrs. *Bell, Brodrick & Gray*; Messrs. *Shum, Crossman & Crossman*, agents for Messrs. *Kidson, Son, & McKenzie, Sunderland*; Messrs. *Raven & Bradley*.

(*) Law Rep., 4 Eq., 521.

[Law Reports, 18 Equity Cases, 188.]

V. C. H., Feb. 14, 1874.

*COPE V. EVANS.

[138

[1872 C. 60.]

Trade-Mark—Infringement—No Evidence of Deception—Degree of Likeness.

Bill by traders, praying for a declaration of their right to a certain trade-mark, and for an injunction to restrain defendants from using a brand alleged to be an imitation of it, dismissed with costs, there being no evidence of actual deception, and no

such imitation of the plaintiffs' trade-mark as, in the opinion of the court, made deception probable.

Seizo v. Provezende (1) discussed.

THE plaintiffs were cigar manufacturers in Liverpool, and the defendants carry on the same trade at Leicester. Both of them carried on a large business.

The plaintiffs were in the habit of packing their cigars in wooden boxes, holding fifty or one hundred cigars; and as to a particular description, they were accustomed since the 23d of April, 1869, with a view to make them easily distinguishable by dealers and consumers, to use a brand or trade-mark, which, as the bill alleged, consists of the words "Flor Fina Prairie Superior Tabac." This brand they stamped on the small wooden boxes. The plaintiffs' case was, that by means of this brand, and of certain labels affixed inside and outside the boxes, the quality of their cigars became well known and easily distinguished in the market. The plaintiffs alleged that they had acquired the sole and exclusive right to the use of the word "Prairie" in connection with this particular quality of cigars. The plaintiffs further alleged that on the 5th of February, 1872, they for the first time discovered that Mr. George Becket, of Liverpool, was in the habit of selling boxes of cigars similar in appearance, shape, and size, to those of the plaintiffs, and stamped with the words "Flor de la Prairie," being an imitation of the plaintiffs' boxes. They immediately applied to the vendor for an explanation, and he immediately gave them the name of the defendants as the persons from whom he obtained such boxes. A correspondence then took place between the respective solicitors, and ultimately the plaintiffs filed this [139] bill for a *declaration of their right to the trade-mark, and for an injunction.

The bill alleged that "the defendants purposely adopt the word 'Prairie' and the words 'Flor de la Prairie,' in order to lead buyers to the opinion that the cigars contained in the defendants' boxes were the above-named quality of the plaintiffs' cigars, and that persons who knew the word 'Prairie' to indicate plaintiffs' cigars, not only believed defendants' to be plaintiffs' cigars, but attributed to plaintiffs the fraudulent use of the word 'Habana' as applied to English cigars."

The defendants, in their answer, alleged that the words "Flor Fina" on the upper part of their brand, and intended to be read in connection with the words "de Superior Tabac," and not in the connection "Flor Fina Prairie," as alleged

(1) Law Rep., 1 Ch., 192.

by the plaintiffs, were stamped without any words upon one end of the said box. They gave a minute description of their trade-mark, and denied that there was such a similarity between the two that one could be mistaken for the other.

The evidence on the part of the plaintiffs was to the effect that purchasers would be probably led into mistaking the defendants' boxes for those of the plaintiffs, but there was no evidence that any person had been misled.

The defendants adduced evidence to prove that no one could probably be misled.

The material part of the evidence is referred to in the judgment.

Mr. *Morgan*, Q.C., and Mr. *Edward Cutler*, for the plaintiffs: The plaintiffs' case is that the defendants, by stamping on their boxes the word "Prairie" used by the plaintiffs, and forming their trade-mark, induced purchasers to believe when they purchased defendants' boxes that they were purchasing plaintiffs'. It is true that the plaintiffs have not been able to obtain evidence that there has been actual deception, because such deception is often very difficult of proof; but the plaintiffs are entitled to every part of their trade-mark, and where the defendants have taken part of it, the plaintiffs are entitled to protection, even although if the two articles were placed together the one could not be mistaken for the other: *Seixo v. Provezende* (*). It is no [140 objection to the plaintiffs' right to the exclusive right to the word "Prairie" as a trade-mark, that the word "Prairie" may be used among the trade, nor that it is used by the plaintiffs in connection with their own name: *Ford v. Forster* (*). The defendants are bound to disprove any possible mistake. It is not necessary that proof should be given of actual deception, because if the court is of opinion that from the appearance of the marks that deception is probable, it will grant relief: *Edelsten v. Edelsten* (*). The question is, what is the probable consequence of the infringement? *Kinahan v. Bolton* (*); *Hirst v. Denham* (*). The same principle was laid down in *Wotherspoon v. Currie* (*), where the likelihood of persons being deceived was held sufficient to entitle the plaintiff in that case to an injunction, though the word "Glenfield" was, and had been for several years, the place of residence of the defendant. In *Leather Cloth Company v. American Leather Cloth Company* (*), the same doctrine was laid down by Lord Kingsdown. In the plain-

(*) Law Rep., 1 Ch., 192.

(*) Ibid., 7 Ch., 611.

(*) 1 D. J. & S., 185, 200.

(*) 15 Ir. Ch. Rep., 75.

(*) Law Rep., 14 Eq., 542.

(*) Law Rep., 5 H. L., 508.

(*) 11 H. L. C., 528.

tiffs' evidence it is shown that there is a probability of the public being deceived by the use the defendants make of the plaintiffs' brand. Moreover, the brands themselves show that this is probable. On these grounds the plaintiffs are entitled to an injunction.

Mr. *Lindley*, Q.C., and Mr. *H. A. Giffard*, for the defendants: It is admitted that there is no evidence in this case of any person having in fact mistaken the defendants' cigars for those of the plaintiffs; and if so, unless the trade-mark is a clear imitation, the plaintiffs are out of court. The principle of all the cases is, that one man has no right to pass off his goods for those of another: *Croft v. Day* (¹); *Sykes v. Sykes* (²); *Leather Cloth Company v. American Leather Cloth Company*; *Wotherspoon v. Currie*; *Edelsten v. Edelsten* (³); *M Andrew v. Bassett* (⁴); *Braham v. 141* **Bustard* (⁵); *Seixo v. Provezende* (⁶); *Ford v. Forster* (⁷); *Radde v. Norman* (⁸). It has been long settled that there is no property in a trade-mark except in connection with this principle: *Millington v. Fox* (⁹); *Canham v. Jones* (¹⁰); *Collins Company v. Brown* (¹¹); *Welch v. Knott* (¹²); *Burgess v. Burgess* (¹³). There must be the passing off of the defendants' goods as a matter of fact, though where the fact is established the intention becomes immaterial: *Millington v. Fox*; *Clement v. Maddick* (¹⁴). But suppose the evidence fails to show this, still, if the defendants have fraudulently imitated the plaintiffs' goods with a view to pass off their own, the court will interfere; but no such case is made out by this bill: *M Andrew v. Bassett* (⁴); *Edelsten v. Edelsten* (³); *Wotherspoon v. Currie* (¹⁵). In like manner, if there is no evidence one way or the other, but the court is satisfied from the evidence that the one class of goods would probably be passed off for the other, it will relieve: *Hirst v. Denham* (¹⁶). It is quite clear there is no such resemblance here. The only cases that seem to favor the plaintiffs' contention are the cases of *Seixo v. Provezende* and *Ford v. Forster*; but the most those cases show is, that it is incumbent on the defendants to disprove a probable passing off of the goods. In the present case, the passing off has not been proved as a fact, and the defendants by

(¹) 7 Beav., 84.

(²) 3 B. & C., 541.

(³) 1 D. J. & S., 185.

(⁴) 33 L. J. (Ch.), 561.

(⁵) 1 H. & M., 447.

(⁶) Law Rep., 1 Ch., 192-195.

(⁷) Ibid., 7 Ch., 611.

(⁸) Ibid., 14 Eq., 348.

(⁹) 3 My. & Cr., 338.

(¹⁰) 2 V. & B., 218.

(¹¹) 3 K. & J., 423.

(¹²) 4 K. & J., 747.

(¹³) 3 D. M. & G., 896.

(¹⁴) 1 Giff., 98.

(¹⁵) 4 D. J. & S., 380-385.

(¹⁶) 1 Ibid., 185-220.

(¹⁷) Law Rep., 5 H. L., 508.

(¹⁸) Ibid., 14 Eq., 542.

their evidence, and by reference to the alleged imitation, have disproved the probability of it; secondly, no fraudulent intention or design has been shown, but the reverse; and, thirdly, it has been shown that there is no such similarity between the articles as is necessary to entitle the plaintiffs to relief: *Woollam v. Ratcliff* ⁽¹⁾. The plaintiffs' case really depends on their having a property in the word "Prairie," which they certainly have not. The bill, it is submitted, must be dismissed with costs.

*SIR CHARLES HALL, V.C.: The plaintiffs are cigar [142 manufacturers at Liverpool. The defendants are cigar manufacturers at Leicester. Both carry on a large business.

The plaintiffs pack their cigars in small wooden boxes containing fifty or 100 cigars, and as regards a special kind and quality of cigars, and to make that quality easily distinguishable to dealers and consumers, they have since the 23d of April, 1869, used and still use a brand or trade-mark which they in their bill state to consist of the words "Flor Fina Prairie Superior Tabac," which they have caused to be stamped by pressure on the small wooden boxes. The plaintiffs say that thereby, and by means of certain labels inside and outside of the boxes, the quality of their cigars is well known and easily distinguished in the market; and they say that they have by the means aforesaid acquired the sole and exclusive right to the use of the word "Prairie" in connection with the particular quality aforesaid.

The defendants have stamped boxes of cigars sold by them with a brand containing the words "Flor de la Prairie," which brand is stamped upon and pasted inside and outside the boxes. The plaintiffs' case, according to their bill is this: they say in par. 6 of their bill, that by the use of the said words "Prairie" and "Flor de la Prairie" (i.e., upon the boxes which are immediately before-mentioned), it is made to appear, not only to retail purchasers but also to the trade, that the cigars contained in the said boxes are those of the plaintiffs' firm. In par. 10 of their bill the plaintiffs allege that large quantities of cigars are sold by the defendants in their boxes, and that they are inferior to the plaintiffs' cigars, and are sold at a lower price than the plaintiffs can sell theirs. They further say, in par. 11 of the bill, that the defendants purposely adopt the word "Prairie," which latter word is a colorable imitation of the plaintiffs' brand, "Flor Fina Prairie," in order to lead buyers to the opinion that the cigars contained in the defendants' boxes are the above-named quality of the plaintiffs' cigars,

(1) 1 H. & M., 259.

which is not the fact ; and in par. 12 of their bill, that persons who inspect the defendants' boxes of cigars, and who know the word "Prairie" to indicate cigars of the [43] *plaintiffs, are not only led to believe that the cigars are the plaintiffs', but attribute to the plaintiffs the fraudulent use of the word "Habana," applied to English cigars. And in par. 13 of the bill it is stated that if the defendants continue to sell boxes of cigars not of the plaintiffs' manufacture, but bearing the brand and labels aforesaid, the plaintiffs will sustain pecuniary loss and injury, and the reputation of the plaintiffs' cigars will be seriously prejudiced. The plaintiffs pray by their bill an injunction to restrain the defendants from selling cigars, not being those of the plaintiffs, packed in boxes bearing or having stamped thereon the word "Prairie," or any brand or label so contrived as by colorable mistake or otherwise to represent the cigars sold thereunder to be cigars supplied by the plaintiffs, and for an account of profits made by selling cigars, not those of the plaintiffs, packed in boxes bearing or having stamped thereon the word "Prairie," or any brand contrived as above-mentioned.

It seems clear that the plaintiffs' complaint and case for relief, stated in the bill, are that by the defendants stamping on their boxes as they do, it is made to appear to purchasers that the defendants' cigars contained in these boxes are the plaintiffs' cigars. The plaintiffs thus ground their case on this, viz., that inspection of the boxes of the defendants by intending purchasers misleads them, and that by reason thereof intending purchasers purchase the cigars of the defendants as those of the plaintiffs.

It may here be convenient for me to state what are the facts as regards the user, and knowledge by the plaintiffs and defendants of user, of the marks or brands above-mentioned. The plaintiffs have used their alleged trade-marks since the 23d of April, 1869. The defendants commenced using their alleged trade-mark in March, 1870, and first became aware of the plaintiffs using their (plaintiffs') alleged trade-mark about the middle of the year 1871. The plaintiffs became aware of the defendants using their trade-mark about the 5th of February, 1872.

The plaintiffs from the time of their commencing the user of their trade-mark became entitled to the protection of this court against any other persons using the same, so as that purchasers might be induced to purchase the goods of other persons as the plaintiffs' goods. And it is not an answer to [44] an application for an *injunction to restrain the user

thereof by another person, for such other person to say and prove that he adopted the trade-mark without knowing that it already belonged to the plaintiff. The defendants should therefore be restrained if they have used the plaintiffs' trade-mark. In considering whether they have so done, it is not, I consider, sufficient for the plaintiffs to say, "Our trade-mark, viz., the word 'Prairie,' appears somewhere on your (defendants') boxes." In cases where it appears that defendants have adopted a plaintiff's trade-mark, and it is proved that defendants' object in doing so was to pass off their own goods as those of the plaintiff, the court will, without further inquiry, restrain the defendants, and it will also do so where there has been such adoption, although proof of the defendants' object be wanting, if it appear that any one has in fact been thereby induced to buy the defendants' goods as being the goods of the plaintiff. In the absence of proof of such object and of such deception, if the two trade-marks are not to the eye of the court either altogether identical, or so similar that the court considers the difference unsubstantial, the plaintiff must make out to the satisfaction of the court that its intervention is required to protect the plaintiff from the defendants' goods being taken for his (plaintiffs'). For the plaintiff to say that his name or mark is to be found on the defendants' goods is not sufficient. Thus, in the case of *Bradbury v. Evans*, in which the proprietors of Punch sought unsuccessfully to restrain the sale of a weekly publication which had adopted the name of Punch and Judy, the court, looking at the two publications, and considering that the later publication would not be taken by purchasers for the earlier one, refused to interfere. The two were so dissimilar in appearance, that, whether the two publications were seen side by side or were seen separately, the one would not be taken for the other. The plaintiffs' counsel has admitted that he could not make out his case if it depended upon mere inspection by the court, but he nevertheless said that the words used by the plaintiffs and the defendants were in reality, or at all events should be deemed by the court to be identical, to make out which he said that there was sufficient evidence before the court to prove that the words "Flor Fina" in the plaintiffs' brand and the words "Flor de la" in the defendants' brand, were mere *prefixes, and would be disregarded. He further [145 said, that, having regard to the evidence, the court should at all events, if it did not consider there was actual identity, consider the case as one of colorable imitation or of unsubstantial difference between the two trade-marks. It appears

to me that in cases in which the court is upon inspection alone not satisfied of the identity of the two trade-marks, or of such a similarity as that the one must be deemed a colorable imitation of the other, the court should not grant an injunction as of course upon such evidence as the plaintiffs' counsel relied on. I think that the court must consider the whole evidence, and, before it grants an injunction, be satisfied that its interposition is really required. However ready the court is and should be to protect trade-marks when protection is really required, it must not be forgotten that such protection by injunction, when granted, is or may be attended with loss to the defendant in rendering useless or depreciating in value articles to which the trade-mark has already been affixed, and in compelling him otherwise to vary the mode in which he has been carrying on business. I therefore proceed to see how the evidence stands. The plaintiffs, not bringing forward any evidence of deception, have produced a witness, a Mr. Hyam Jonas, a tobacco merchant and importer of cigars, who, in an affidavit filed on the 26th of June, 1873, par. 5, says, "The words 'Flor de la Prairie' on the defendants' boxes of cigars are, in my judgment and belief, in substance, as a brand, the same as 'Flor Fina Prairie' on the plaintiffs' boxes of cigars; and I say that if two brands, as substantially the same or so nearly identical as those in question, could be legally used by different traders, considerable loss and damage would be sustained by the person who first commenced to use the brand, and whose cigars commanded an extensive sale, and the public generally would be misled and defrauded by having inferior goods sold under a brand or name which could or would not be practically distinguished from the brand which had required repute in the trade or estimation with the public." Five other witnesses depose to the same effect. I observe upon these affidavits that the witnesses do not say that they individually would be misled by the defendants' boxes having thereon the word "Prairie" as it is thereon; their statements as to the public being misled are only statements of the opinion of the witnesses. In answer to these affidavits, Richard Sherwood, a tobacconist and wholesale and retail dealer, in an affidavit filed on the 5th of July, 1872, par. 6, says, "I have seen the plaintiffs' 'Prairie' brand cigars, and I say from my experience that owing to the great dissimilarity between such brand and that of the defendants, called 'Flor de la Prairie,' or 'Prairie Flower,' it would be utterly impossible for a tobacconist, or dealer in cigars, or the public generally, to be misled and deceived by

having the one substituted for the other." Five other witnesses depose to the same effect. I observe upon these affidavits that the witnesses, I consider, say in effect that they would not be deceived. Their evidence as to the public, like the evidence for the plaintiff as to the public being misled, consists only of statement of opinion. The defendants in their answer, par. 22, say that they believe no one has been misled. I cannot, upon this evidence for the plaintiffs and defendants, say that I am satisfied that the use of the word "Prairie" on the defendants' boxes, as it has been used thereon, will cause their goods to be sold for those of the plaintiffs.

The plaintiffs have, however, brought forward in argument a further contention. I do not stop to inquire whether this is open on the pleadings in this suit. They have said that, in giving orders for cigars, the orders are commonly given mentioning only the name of the brand, which in this case is "Prairie," and in this way the use of the word "Prairie" on the boxes will lead to the defendants' goods being sold for the plaintiffs'. In support of this, it is said by Mr. Jonas in his affidavit already referred to, pars. 3 and 4, as follows: "The words 'Flor,' 'Flor Fina,' and 'Flor de la,' are very frequently prefixed to the name or brand as stamped on the boxes in which the cigars are sold, and the trade and the general public, when referring to any particular brand of cigars to which either of those forms of words is prefixed, almost invariably use the distinctive word or name of the brand, and omit the words 'Flor,' 'Flor Fina,' or 'Flor de la.' Such words on boxes of cigars are common to the great mass of cigars sold, and are, by usage, treated as superfluous for describing the particular brand intended." Par. 4: "I am almost daily in the habit of giving orders for cigars to be supplied to my said firm, or of receiving *orders for cigars to be supplied by my said firm, and I [147 say that in almost every case such orders are given for the cigars by the distinctive name or brand, and without the addition of 'Flor,' 'Flor Fina,' or 'Flor de la,' whenever those prefixes are used on the boxes as part of a brand." Five other witnesses deposed in similar terms. On the part of the defendants, Richard Sherwood, in his affidavit above referred to, pars. 2, 3, and 4, says: (Par. 2) "The words 'Flor' and 'Flor Fina' are used by all the English manufacturers to denote the different qualities of cigars, and are not a part of or prefixed to the name or brand of the cigar, except in very occasional cases." (Par. 3) "I know the 'Flor de la Prairie' or 'Prairie Flower' cigars manufac-

tured and sold by the defendants under that title, and I say that in my opinion the words 'Flor de la' are an integral and inseparable part of the designation 'Flor de la Prairie,' or 'Prairie Flower,' and that such words have quite a different meaning to the words 'Flor' and 'Flor Fina,' and are used in an entirely different manner." (Par. 4) "I have never known the words 'Flor de la' to be used as a prefix to the name or brand of any other cigars than the 'Flor de la Prairie' or 'Prairie Flower' cigars of the defendants." More than six other witnesses depose to the same effect. As to this the defendants say in an affidavit filed by them on the 3d of July, 1872, par. 7, "And we further say that our cigars are invariably ordered from us by our customers, and invoiced by us to them, under the distinctive title 'Flor de la Prairie' or 'Prairie Flower,' and never under the title of 'Prairie' alone." Thus, if this affidavit is credible, although the defendant had been carrying on business and using the brand, the user of which is sought to be restrained from March, 1870, until the 3d of July, 1872, they never received an order for "Prairie" cigars so described without the prefix "Flor de la," and no instance has been produced of any such order having been given. As to the credibility of this statement, it is to be observed that the plaintiffs have interrogated the defendants, and had an answer telling them, par. 23 of the answer, all the orders actually given; and no doubt the plaintiffs have had, or might have had, inspection of all the defendants' books and papers. I think the defendants' statement must be taken to be correct, there being no [48] evidence given that any one *ever did give an order for the defendants' cigars without the prefix. But the plaintiffs' counsel have concluded that, if such an order has not been given, it "may" be given, and that the judgment given by Lord Cranworth in *Seixo v. Provezende* (1) compels me to give judgment in the plaintiffs' favor. In that case the plaintiff, the owner of a vineyard, sought to restrain the defendant from marking his casks with a particular brand; it is stated in the report (2) a great quantity of evidence was entered into on both sides upon many points, particularly as to whether the defendant's quinta had ever been called De Seixo. It was proved by the plaintiff, and not denied, that the broker employed by the defendant had offered this wine as "Crown Seixo de Cima" wine; and one broker deposed that he was surprised at being offered this wine by the broker of the defendant, and thought it was the plaintiff's. The plaintiff's quinta would produce about 300 pipes

(1) Law Rep., 1 Ch., 192.

(2) Law Rep., 1 Ch., 193.

a year, but those of the defendant would not produce more than forty pipes. There was, therefore, actual deception. But the plaintiffs in the present case principally rely upon the passages of Lord Cranworth's judgment, to which I will now refer⁽¹⁾: "If the question turned on the inquiry whether a person having a cask of the plaintiff's and a cask of the defendant's placed before his eyes could mistake the one for the other, there could be no doubt as to the result, for the marks on the one and on the other are altogether different. But that is not the question, or not the sole question, to be considered. The principle on which relief is given in these cases is that one man cannot offer his goods for sale representing them to be the manufacture of a rival trader. Supposing the rival to have obtained celebrity in his manufacture, he is entitled to all the advantages of that celebrity, whether resulting from the greater demand for his goods or from the higher price which the public are willing to give for them, rather than for the goods of other manufacturers whose reputation is not so high. Where, therefore, a manufacturer has been in the habit of stamping the goods which he has manufactured with a particular mark or brand, so that thereby persons purchasing goods of that description know them to be of his manufacture, no other manufacturer has a *right to adopt the same stamp. [149 By doing so he would be substantially representing the goods to be of the manufacture of the manufacturer who had previously adopted the stamp or mark in question, and so would or might be depriving him of the profit he might have made by the sale of the goods which, *ex hypothesi*, the purchaser intended to buy."

"If a purchaser, looking at the article offered to him, would naturally be led, from the mark impressed on it, to suppose it to be the production of the rival manufacturer, and would purchase it in that belief, the court considers the use of such a mark to be fraudulent. But I go further. I do not consider the actual physical resemblance of the two marks to be the sole question for consideration. If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market, may be as much a violation of the rights of that rival" (this manifestly means of the other trader) "as the actual copy of his device. It is mainly on this ground that

(1) Law Rep., 1 Ch., 195, 196.

I have come to the conclusion that the decision of the Vice-Chancellor in the present case was correct."

"Ever since the year 1848, the plaintiff, Baron Seixo, had caused his casks to be stamped with his coronet and the word 'Seixo,' and the evidence shows that his wines had thus acquired in the market the name of 'Crown Seixo Wine.' When, therefore, the defendant, in the year 1862, adopted as his device a coronet, with the words 'Seixo de Cima,' meaning Upper Seixo, below it, the consequence was almost inevitable that persons with only the ordinary knowledge of the usages of the wine trade from Oporto would suppose that, in purchasing a cask of wine so marked, they were purchasing what was generally known in the market as 'Crown Seixo Wine.' The present case is thus brought distinctly within the principle on which all these cases rest. The plaintiff had adopted a device, or trade-mark, which had caused his wines to obtain celebrity under a name descriptive of that trade-mark. The defendant has adopted a trade-mark which could not fail to lead purchasers to attribute to the wines so marked the same name as that under [50] which the plaintiff's wines were known, and so to believe that in purchasing them they would be purchasing the wines of the plaintiff. Against the use of such a trade-mark the plaintiff has a right to have the injunction of this court."

Lord Cranworth here says that if the rival trader adopts a mark which will cause his goods to bear the same name in the market, this may be a violation. He then proceeds to examine the case before him, and says that, the mark being adopted, the consequence was almost inevitable that persons would suppose that in purchasing a cask of the defendant's wine they were purchasing that of the plaintiff; that the defendant's mark could not fail to lead purchasers to attribute to the wines so marked the same name as that under which the plaintiff's wines were known. Have the plaintiffs in the present case shown that the defendants' user of their mark will cause their goods to be taken for the plaintiffs'? Will it be the inevitable consequence of the use by the defendants of their mark that purchasers in purchasing the defendants' cigars will believe that they are purchasing the plaintiffs'? Is it true that the defendants' mark cannot fail to attribute to their goods the same name as is used by the plaintiffs? Upon the evidence in this case, I answer all these questions in the negative.

I have not examined all the numerous decisions which were referred to in the course of the argument. They are

so well known, and so constantly referred to, that to do so is, I think, unnecessary; but I desire to mention shortly a few of them in reference to what is stated in them, as to when the court should interfere in cases of this kind.

In *Kinahan v. Bolton* (*) Lord Chancellor Brady says (*), that injury might be done by inducing the belief that the spurious article was genuine. In *Seixo v. Provezende* (*) Lord Cranworth said, that the defendant was not justified in adopting a device or brand the probable effect of which would be to lead the public to purchase his wine supposing it to be the plaintiff's. In *Edelsten v. Edelsten* (*) Lord Westbury says (*), "It is not necessary for relief in equity that proof should be given of persons having *been actually [15] deceived, and having bought goods with the defendants' mark, under the belief that they were the manufacture of the plaintiffs, provided the court be satisfied that the resemblance is such as would be likely to cause the one mark to be mistaken for the other." In *Hirst v. Denham* (*) Vice-Chancellor Bacon puts the title to relief on the ground that purchasers may be misled. In *Wotherspoon v. Currie* (*) Lord Chelmsford says, "It is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use, if the resemblance is such as not only to show an intention to deceive, but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade-mark belongs." In *Leather Cloth Company v. American Leather Cloth Company* (*) Lord Kingsdown says, "The general rule seems to be, that the misstatement of any material fact calculated to deceive the public will be sufficient for the purpose."

From these judgments I take it that the law of the court is, that it will not grant the injunction unless it is satisfied that there will be deception, or that there is a probability or likelihood of deception, or, in Lord Kingsdown's words, that what the defendant does is calculated to deceive. In this case I am not so satisfied. The burden of proof is on the plaintiffs, there being no proof of actual deception, and no proof that the defendants' object was deception. The Vice-Chancellor Wood, in *Woollams v. Ratcliff*, says (*), "I do not believe that any one, at least in England, would

(*) 15 Ir. Ch. Rep., 75.

(*) Ibid., p. 77.

(*) Law Rep., 1 Ch., 198.

(*) 1 D. J. & S., 185.

(*) 1 D. J. & S., 200.

(*) Law Rep., 14 Eq., 542.

(*) Ibid., 5 H. L., 508.

(*) 11 H. L. C., 523, 542.

(*) 1 H. & M., 259, 263.

have been in fact deceived in the absence of the special trade-mark. . . . I have no evidence that any one has been in fact deceived, and I do not think myself justified in assuming that such has been the case." Nor do I, in this case, feel myself so justified ; I must dismiss the plaintiffs' bill, and of course with costs.

Solicitors for the plaintiffs : Messrs. *Lumley & Lumley*.

Solicitors for the defendants : Messrs. *Paterson, Snow & Burney*.

[Law Reports, 18 Equity Cases, 152.]

V.-C.H., April 30, 1874.

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*PERRY v. MERRITT.

[1872 P. 58.]

Will—Repugnancy—Gift for Absolute Use of Legatee—Subsequent Bequest of Money remaining after Death of Legatee.

Testator gave all his real and personal estate to trustees upon trust, after paying his debts, to pay the residue of his personal estate to his wife for her own absolute use and benefit, and the rents and annual income of his real and leasehold estates to her during her life; and after making provision for certain legatees and annuitants, he gave his freehold estate, after the death of his wife, to his grandson, and all the money (if any) that should be remaining after payment of his wife's just debts, he gave to legatees named as tenants in common, equally. The widow died shortly after the testator, intestate:

Held, that she took an absolute interest in the residuary personal estate, and that it belonged to her next of kin.

FURTHER consideration.

Thomas Merritt, who died on the 28th of November, 1871, by his will, dated the 26th of April, 1870, gave to two trustees, the plaintiffs (whom he also appointed executors), their heirs, &c., all his real and personal estate, upon trust, after paying his debts, funeral and testamentary expenses, and certain legacies, to pay the residue of his personal estate to his wife Elizabeth Merritt, "for her own absolute use and benefit," and he directed his trustees to pay the rents and annual income of all his real and leasehold estates to his wife during her life. The testator then gave certain legacies of small amounts to several legatees, and after the death of his wife gave to his grandson Charles Jenkins the rents of two leasehold houses, the said rents to be for the sole support and maintenance of his daughter, Elizabeth Merritt, the first-named defendant (a person of unsound mind, but not so found by inquisition), during her life, and

after her death the said houses were to be sold by the trustees, and the proceeds divided between the testator's daughter Ann Griffiths and three other persons named. The testator gave some small annuities to other beneficiaries, and then gave unto his grandson above-named, after the death of his wife, all his freehold house and lands situate at *Bitton, in fee, "and all the money (if any) that shall [153 be remaining after payment of the just debts and funeral expenses of my dear wife Elizabeth Merritt, shall be equally divided between my said daughter Ann Griffiths and her three children," and three other persons named, "share and share alike as tenants in common." The widow of the testator died on the 17th of December, 1871, intestate, and the first-named defendant was her sole next of kin. Ann Griffiths, the only other next of kin of the testator, was a daughter by a former wife. The testator left property of considerable value, and the trustees filed this bill for its administration by the court. The material question now was, whether the testator's widow was entitled to the residuary personal estate absolutely or not?

Mr. *T. T. Simpson*, for the plaintiffs, stated the facts of the case.

Mr. *B. B. Rogers*, for the first-named defendant, contended that the widow took an absolute interest, and that the gift at the end of the will was nugatory. In *Watkins v. Williams* (*) it was decided that where a money fund is given to a person absolutely, a condition cannot be annexed to the gift that so much as he shall not dispose of shall go over to another person, but it belongs to the first donee absolutely.

[He also referred to *Randfield v. Randfield* (*).]

Mr. *T. L. Wilkinson*, for the defendants Charles Jenkins and others, submitted that they were entitled to the residuary personalty.

SIR CHARLES HALL, V.C.: I think that the principle of the case of *Watkins v. Williams* is applicable to a case of this description. The whole of the residue of the personal estate was given to the wife for her own absolute use and benefit. She was, I think, at liberty to apply, dispose of, and to spend the capital for her own use and benefit as she might think proper. The wife having that power to spend the capital, what does the other gift at the end of the will amount to? That *gift is in substance one of the money [154 remaining after the payment of the just debts of his wife, i. e., the money remaining after what the wife had thought

(*) 3 Mac. & G., 622.

(*) 2 De G. & J., 57.

1874

Hill v. South Staffordshire Railway Co.

V.-C.H.

proper to spend; and the payment of her just debts. A gift of this kind is of so indefinite a character, and is so repugnant to the power of disposition given to the wife, that I cannot give effect to it. In *Henderson v. Cross* ⁽¹⁾ there was a bequest of residue to the testatrix's father "to spend both principal and interest, or any part of it, during his lifetime;" should he "not spend the property," then in trust for the testatrix's sisters; and it was held that the gift to the father was absolute, and that the gift over was inconsistent with it, and inoperative. The Master of the Rolls decided the case upon that ground, and in that case *Ross v. Ross* ⁽²⁾, in which a limitation over was held to be void, was referred to. I am of opinion that the widow was absolutely entitled. There must be a declaration to that effect, and the personal estate in court must be carried over to the separate account of her legal personal representative.

Solicitors: Messrs. *Cowdell, Grundy & Browne*, agents for Mr. *H. H. Field, Swansea*; Mr. *L. W. Gregory*, agent for Mr. *Jonathan Perrin, Bristol*.

⁽¹⁾ 29 Beav., 216.

⁽²⁾ 1 Jac. & W., 154.

[Law Reports, 18 Equity Cases, 154.]

V.-C.H., March 18, 19, 20, 21, 1874.

HILL V. SOUTH STAFFORDSHIRE RAILWAY COMPANY.

[1857 H. 165.]

Railway Company and Contractor—Disputed Accounts—Demand of Payment—Interest—3 & 4 Wm. 4, c. 42, s. 28—Costs.

The contract between a railway company and a contractor provided that payments should be made monthly, as the works proceeded, on the certificates of the company's engineer. There was no stipulation in the contract in reference to the payment of interest to the contractor on any sums due, but not paid to him. The contractor made a demand in writing for a sum as the balance due to him, and claimed interest thereon. His accounts were disputed, but on a bill filed by him against the company, the result showed that he was entitled to a balance less than one-half of the sum which he had claimed to be due from the company:

155] *Held*, that the contractor was not entitled to interest either under the contract, there being no express stipulation on the part of the company to pay any, or under the statute 3 & 4 Will. 4, c. 42, s. 28, the demand in writing for payment not being of a sum certain payable at a certain time.

Mildmay v. Methuen ⁽¹⁾ and *McIntosh v. Great Western Railway Company* ⁽²⁾ observed upon.

THE plaintiff Thomas Hill and two others, on the 6th of August, 1847, entered into a contract with the South Staffordshire Railway Company to construct their line of railway in accordance with the specification annexed thereto,

⁽¹⁾ 3 Drew., 91.

⁽²⁾ 4 Giff., 683.

and to complete the works on or before the 1st of September, 1848. There were supplemental contracts subsequently to construct additional works. The time for completion of the railway was, in November, 1848, extended to the 1st of July, 1849, and a bonus of £4,000 was then promised for extra dispatch. In April, 1849, the time was again extended to November, 1849, and another bonus of £2,000 was promised for extra dispatch. The railway was completed, handed over to the company, and opened on the 1st of May, 1850. One clause of the original contract provided, that it should not be lawful for the contractors to make any alterations, additions, or omissions whatsoever without the express direction and consent in writing of the principal engineer of the company for the time being, countersigned by the chairman of the directors for the time being, for that purpose first had and obtained on each occasion: and in respect of any alterations, additions, or omissions made without such express direction or consent as aforesaid, countersigned as aforesaid (whether adopted or objected to at the time, or afterwards, or not), the contractors should not be entitled to, or to demand or recover from the company, or their successors, any allowance or payments whatsoever. By another clause of the contract it was agreed that the contractors should be paid for the whole of the works therein contracted to be done the sum of £92,511 12s. 6½d., subject to stipulations for the diminution thereof in case of certain alterations of, or omissions from, the works, and, also, such further or other sum as the principal engineer might certify in writing under his hand to be due from the company to the contractors for alterations or extra work; and the same was to be paid as the works proceeded by instalments every month of such amount (less *10 per cent.) as the principal [156] engineer of the company might at the end of any month (upon being furnished by the contractors with an account of such works) certify. In the specification it was stated that the contractor was to maintain all the permanent works constructed under the contract, and leave the same in complete repair twelve calendar months after the completion of the whole of the works as thereby required by the contract, and the contract would not be completed until the termination of such liability to uphold; but such liability was to be limited as to any portions to twelve months after any such portions should have been opened for public traffic, if opened before the whole of the works had been entirely completed. A part of the line was completed on the 3d of August, 1849, another part in March, 1850, and the whole of it was com-

pleted and opened for traffic on the 1st of May, 1850; therefore, the year of maintenance expired on the 1st of May, 1851. The 10 per cent. was to be retained until the completion of the works.

The aggregate amount actually paid was £136,094, but the total sum claimed by the contractors in their final bill was in excess of that amount. They also claimed the before mentioned two sum of £4,000 and £2,000. There was also a claim for extra works mentioned in the accounts of day-work. The last certificate of the engineer was dated in March, 1852. The whole railway was in February, 1851, leased to Mr. Maclean, the principal engineer of the company. The contractors sent to the company their final account, and asked for payment of what they alleged remained due, viz., £13,000 odd. That account was investigated by the engineer. A controversy arose as to the allowance by the engineer of the bonuses, and of certain other sums. The contractors declined to refer the whole matters in dispute to Mr. Maclean's arbitration, on the ground that he was lessee of the railway. On the 25th of April, 1856, the contractors' solicitor wrote to the company, enclosing a summary of their account against the company, by which, he said, the company would see that the contractors claimed a balance of £13,000 odd, "and interest thereon from the respective times when the money ought to have been certified and paid to the time of payment." As it was found that the contractors and the company could not settle their differences, [57] this suit *was instituted by Thomas Hill, the surviving contractor, on the 10th of August, 1857, against the defendants, the South Staffordshire Railway Company, and R. C. Chawner, the chairman, J. R. Maclean, the engineer, and, by amendment, T. J. Buckton, the secretary, and it sought a declaration that the plaintiff was entitled to two sums or bonuses of £4,000 and £2,000, which, it was alleged, were promised him in consideration of extra dispatch, with a view to getting the works done by a certain time. The plaintiff also claimed a sum of £13,000 odd, in addition to the sums which had been paid by the company; and it also sought to have an account taken of what was due to the plaintiff in respect of the contracts entered into by him, and prayed that the defendants might be charged with interest on the sums unpaid, which the plaintiff was from time to time entitled to receive under the certificates; and also on the balance which might be found due from the defendants in taking the accounts; and that in taking the accounts certain allowances might be directed to be made

for losses sustained by the plaintiff by reason of non-delivery of possession of land to him as contractor within the time limited by the contract.

The cause came on to be heard before Vice-Chancellor Stuart in 1864 (the bill having previously been amended and re-amended), and by the decree made by him, dated the 8th of March, 1864, it was declared that the plaintiff was entitled to be allowed the sums of £4,000 and £2,000 claimed by him in respect of bonuses agreed to be paid by the defendants to him for extra dispatch, increased expenses, and extraordinary means used and employed in expediting and completing the works of certain parts of the railway; that the plaintiff was also entitled to be allowed the sum of £1,800 in respect of losses and damages sustained by the delay in getting possession of certain land; and that the plaintiff was also entitled to be allowed the sum of £1,249 14s. claimed by him as a remuneration for expenses incurred by him in reconstructing works which had given way in consequence of a subsidence of the ground, occasioned by mining operations; and it was ordered that the defendants should, on or before the 30th of April, 1864, pay to the plaintiff the sums, together £9,040 14s., with interest at the rate of £5 per cent. from the 26th of April, 1856, being the date *of the letter of the plaintiff's solicitor, claim- [158 ing interest to the day of payment. It was at the same time ordered that an account should be taken of what, if anything, remained due to the plaintiff in respect of the balance of daywork claimed by him in his final account; that the defendants should, within one calendar month after the chief clerk's certificate, pay to the plaintiff what should be certified to be due to him on taking the said account, together with interest thereon at £5 per cent. from the 26th of April, 1856, to the day of payment; that the costs of the inquiry should be reserved to be dealt with as the judge at Chambers should direct, and that the defendants, the railway company, should pay to the plaintiff his costs of the cause, up to and including the decree. The bill as against the other three defendants was dismissed without costs.

The defendants appealed against that decree.

By an order of the Lords Justices, dated the 21st of January, 1865, the decree of the 8th of March, 1864, was discharged without prejudice to any questions in the cause; and it was declared that the plaintiff was entitled to be allowed in the account thereafter directed the said sums of £4,000 and £2,000. But it was also declared that the plaintiff was not entitled to be allowed the sum of £1,800,

or any part thereof, and was not entitled to any allowances in respect of any loss or damage sustained by delays in getting possession of lands; and it was ordered that an account should be taken of what (if anything) remained due to the plaintiff in respect of the several works and matters included in the final account and in the accounts of daywork delivered by the plaintiff to the defendants—the company; and in taking such account, any items in the accounts delivered which might be found to have been settled were not to be disturbed; that for the purposes of such account all such inquiries should be made as might be necessary for the purpose of ascertaining what (if anything) the plaintiff and his co-contractors, or the survivor of them, had become entitled to, or the plaintiff was then entitled to, in respect of accidents or damages arising from mining operations, and what (if anything) the plaintiff should be found to be entitled to in respect thereof was to be allowed him in taking the said account; that the plaintiff's bill should stand dismissed as [59] against the *defendant T. J. Buckton, with costs; that the amount of such costs should be paid by the plaintiff to the said defendant, but such payment was to be without prejudice to any question as to the plaintiff being ultimately entitled to recover such costs against the company; that the bill should stand dismissed, without costs, as against the other two defendants above-named; and all questions of interest were reserved, and also all other costs and further consideration, to the judge to whose court the cause was attached. The plaintiff, Thomas Hill, died in February, 1867, during the prosecution of the accounts, having by his will appointed his wife and two other persons executors thereof; and they, on their petition in November, 1867, were allowed to revive the suit.

The defendants appealed to the House of Lords against the decree of the Lords Justices; and subsequently the plaintiffs also appealed in respect of the disallowance of the sum of £1,800. The House of Lords, on the 29th of July, 1872, ordered that the decree of the Lords Justices should be varied by directing an account to be taken of what (if anything) was due to the plaintiff on the footing of the several contracts in the pleadings mentioned in lieu of the account which was directed by the said decree; and that, subject to such variation, the said decree in other respects should be affirmed; that the appellants should pay to the respondents the costs incurred in respect of the appeal; that the cross appeal should be dismissed; that the appellants in the cross appeal should pay to the respondents therein their costs in

respect of such cross appeal; and that the cause should be remitted back to the Court of Chancery.

In pursuance of the directions given by Vice-Chancellor Wickens, the chief clerk, in July, 1873, certified, first, that there was due to the plaintiffs on the footing of the several contracts in the pleadings mentioned, including the two sums of £4,000 and £2,000, and including also any sums allowed pursuant to the order of the 21st of January, 1865, in respect of accidents or damages arising from mining operations, the sum of £5,626 16s. 9d. The particulars of this sum were set forth in the first schedule to the certificate. The chief clerk stated that, for the purpose of taking the account the final bill and accounts for daywork mentioned in the order of January, 1865, were produced; and that he had taken *the account by reference to admitted [160 copies thereof; and that such items as had been allowed and remained due to the plaintiffs in respect of the several contracts referred to were mentioned in such first schedule; and such of the items claimed by the plaintiffs to be due in respect of the said contracts as did not appear in the first schedule had been disallowed. The evidence produced before the chief clerk in taking the accounts was mentioned in the second schedule to the certificate. Of the above-mentioned sum of £5,626 16s. 9d., the sum of £1,272 10s. 6½d. was for "allowances on account of extra works mentioned in the accounts of daywork hereinbefore referred to."

The defendants, in August, 1873, took out a summons to vary the certificate by disallowing certain items. The summons was refused on the ground that the points raised had been concluded by the previous judgments.

On the further consideration, the material questions were: first, whether the plaintiffs were entitled to any interest; and, secondly, who should pay the costs of the litigation?

Mr. *Dickinson*, Q.C., and Mr. *T. A. Roberts*, for the plaintiffs: First, as to the question of interest. This litigation arose in consequence of the company refusing to pay to the contractors the balance which they claimed in the final account. The railway was opened on the 1st of May, 1850. By the contract the contractors were to be paid monthly, less 10 per cent., which the company were to retain, as the contractors were to maintain the works for twelve months after the completion of them. At the end of that time there should have been a final payment. The company did not perform that duty. Disputes had arisen in reference to the accounts. Those accounts were investigated during the years 1851-2-3, but it was not till August, 1857,

that this suit was instituted for the purpose of compelling payment of what was claimed. When the cause was heard by Vice-Chancellor Stuart, in 1864, he considered that as to the sums of £4,000 and £2,000, they were by the agreement to be paid immediately, without regard to any account, and he ordered the company to pay interest upon them. It appeared, however, that there had been payments of portions of those two sums from time to time, and therefore the 161] *Lords Justices considered that those sums were not to be paid at a time certain, but that they should enter into the general account. Their lordships would not order interest to be paid at once, because those sums had practically been brought into such account. They were, it was said, not sums certain to be paid at a certain time, but after the account had been taken. Their lordships said, however, it might be that the company would be bound to pay interest on the sum due from the company when it should be found due.

Now it is submitted that the "certain sum" is a sum to be ascertained on taking the account. By the term "certain," a particular sum of £9,000 or £10,000 is not meant; but the certain sum is the sum due on the contract, and according to the interpretation of the contract, the sum certain that was to be paid to the plaintiffs was the amount which is now found due, after deducting those sums which had been paid to them—the balance of that sum is the sum which has been made certain by taking the account, and which was payable to the plaintiffs immediately upon the completion of their contract and the handing over of the works to the defendants on the 1st of May, 1850, or at any rate so far as the 10 per cent. is concerned, from the 1st of May, 1851. If there had been nothing else, that would be sufficient to entitle the plaintiffs to interest as from those times; but it does not stop there: for in the case of a mortgage or other deed in which there is a covenant for payment of a sum certain, which of course means a certain amount, which can be made certain, though there is no provision for payment of interest, the covenant for the payment of a certain sum will carry interest: *Ashwell v. Staunton* (1). Now on the construction of this contract, as payment was to be made from month to month, although not quite complete, because 10 per cent. was to be kept back, the time certain was the time of the completion of the works. If the sum certain was dependent on the execution of the works, the amount has been derived from and made certain by the tak-

(1) 30 Beav., 52.

ing of the account, and therefore upon the account being taken, and the sum ascertained with certainty, as it has been, that is the sum which the defendants contracted to pay, and the sum which was contracted to be paid at the certain *time mentioned; but if that be not so, then it is submitted that the written demand of the 25th of April, 1856, for payment of interest, is sufficient.

[The VICE-CHANCELLOR: Is there not some difficulty in all that when the plaintiffs were claiming that to which they were not entitled?]

They do not claim interest on what they are not entitled to, but on what they are entitled to; and what that is depends on taking the accounts properly. There is no reason why that which they are entitled to should not carry interest, because there is something else in the accounts which they are not entitled to. The amount to which they are entitled has been ascertained on taking the accounts, and that having been done, the plaintiffs are entitled to interest as from the time when the sum should have been paid. If the company had tendered or offered to pay the sum now found due to the plaintiffs, and they had not taken it, that would have stopped the payment of interest if it had afterwards turned out that the plaintiffs were in the wrong. But the defendants made no offer, and this suit became necessary, and as the result of it shows that the plaintiffs have been kept out of their money since 1850, or at any rate since 1851, as to the 10 per cent., and the company having failed in their contention, it is submitted that the plaintiffs are entitled to interest from that time, or at all events from the date of the receipt by the officer of the company of the letter of the 25th of April, 1856: *Alison's Case* (*).

It was also contended that, as the plaintiffs had virtually succeeded in their litigation, they were entitled to all their costs of the suit, including any that the plaintiffs might have to pay Mr. Buckton; and they referred to *Jeffryes v. Agra and Masterman's Bank* (*).

Mr. Lindley, Q.C., Mr. Speed, and Mr. Millar, for the defendants: As to interest: On what principle are the plaintiffs to have it? Under the contract, or in some other way? But the contract says nothing at all about it. There is no covenant, nor is there any *recital in the contract to pay [163 any. There is a stipulation that the company were not to pay interest on the 10 per cent. which they were at liberty to reserve, but whether any was reserved is not known. It may be inferred from the certificates of the engineer that

(*) Law Rep., 15 Eq., 394; Ibid., 9 Ch., 1.

(*) Law Rep., 2 Eq., 674.

the company did not reserve it. There is nothing in the contract in the shape of a covenant which would entitle the contractor to maintain an action against the company for interest. In *Ashwell v. Staunton* ⁽¹⁾, there was a covenant to pay a certain sum of money on a certain day, and there the Master of the Rolls gave interest because of the recital in the deed. The judgment, in fact, proceeded upon it. But in the case of *Thompson v. Drew* ⁽²⁾, the Master of the Rolls, the covenant there being in a mortgage deed to pay on a certain day, said, "I think the deed does not carry interest." Apart from these authorities, it is perfectly plain that where there is no contract or express covenant to pay interest, it can be got only on one of two principles: by mercantile usage, apart from any statute; and under the statute 3 & 4 Will. 4, c. 42. Apart from that statute there is no obligation to pay interest, because a sum of money may be made payable by deed or otherwise on a particular day. To enable any person to obtain interest under the statute, there must be a debt or sum certain; it must be payable at a certain time by virtue of a written agreement, or there must be a written demand for payment of the interest, and in that case it will run from the time of the demand. The statute applies only to debts or sums certain—it has nothing whatever to do with demands for unliquidated damages. Is the sum now found to be due from the defendants a debt or sum certain? That will depend upon the meaning of the expression "certain." There was no certainty what would become payable to the contractor, even in respect of the £92,000, for that was subject to variation. And unquestionably the other sums which became payable under the contracts were not sums certain. What is meant by a "sum certain?" Everything is certain when it is ascertained, but to put on the expression "sum certain" in the statute the wide interpretation contended for on the part of the plaintiffs would be improper. It is said that anything is certain which may be rendered so, by the contract or anything [164] else—that is clearly too wide a *construction. The question, what is a "sum certain," arose under the Stamp Act, 55 Geo. 3, c. 184. In *Annandale v. Pattison* ⁽³⁾, there was a bond by which a principal and a surety bound themselves to pay to the creditors of a debtor 14s. in the pound on the amount of their debts, and by the same bond the principal bound himself to indemnify the surety against all loss. The bond of indemnity was for that which some one might have to pay, and that which might have to be paid

⁽¹⁾ 30 Beav., 52.⁽²⁾ 20 Beav., 49.⁽³⁾ 9 B. & C., 919.

was ascertained by a simple calculation. If it had been a bond for a sum certain, it would have required a larger stamp than that affixed; but it was held that the bond was not for any certain sum of money, so as to require an *ad valorem* stamp. There was, however, nothing uncertain in that particular case. All that had to be done was to find out how 14s. in the pound were to be covered by the bond—a mere matter of calculation—and therefore there was a bond for a sum certain; yet the court held that it was not a sum certain within the meaning of the act. Now, can it be said that because the chief clerk has found that a sum—now, of course, a “certain sum”—is payable by the defendants, that it is a debt or sum certain within the meaning of the statute? When was it certain? Was it so before it was ascertained? How can it be said that the money which is ultimately found due in respect of all sorts of work constitutes a debt or sum certain within such meaning? It can only be upon the theory that everything is certain when it is made so—a proposition not disputed—but it is plain that interest is to be payable in respect of a certain instrument, therefore it must be a definite stated sum, mentioned in the agreement itself. It cannot be found in the contract itself what particular sum can possibly be payable under it. To do that, the functions of the engineer must be performed; for it was deputed to him to find out in respect of what works the calculations were to be made. In the case of *In re State Fire Insurance Company* ⁽¹⁾, an attempt was made to obtain interest on unpaid instalments of consideration money from the times when they became due, and though the agreement contained no provision for the payment of interest, the court held that the creditor was entitled to 5 per cent., and that the court had jurisdiction under 11 & 12 Vict. c. 45, s. 83, to make *calls to raise [165 the amount of such interest; but no interest was payable in respect of the unliquidated balance. The interest that was allowed was upon a debt payable at a fixed time, for which a jury would have given interest at 5 per cent., under 3 & 4 Will. 4, c. 42, s. 28. This court can give interest in this case, if it feels so disposed, but it must be given under that statute, and in conformity with its provisions. It is quite impossible to say that what is now due to the contractor was certain at any time before the chief clerk’s certificate was made; therefore, under the statute 3 & 4 Will. 4, it cannot be considered that the sum found due from the defendants is a debt or sum certain within the meaning of it.

⁽¹⁾ 2 H. & M., 722; 34 L. J. (Ch.), 58.

Then, is it material to consider whether the letter of April, 1866, be good for anything or not? It only becomes so if the defendants fail to make good their first point under the statute. The letter was a claim for the balance of £13,000 odd, "and interest thereon from the respective times when the money ought to have been certified and paid, to the time of payment." What those times are, the defendants do not know. The defendants have submitted that the contractor was paid more than he was entitled to in respect of all the works done; but it is certified that a balance remains due from them. How are they to be charged with interest upon anything not paid? The claim was for interest on a "balance" due to the plaintiffs after they gave credit for the large sum which they had been paid on account, and there is no authority for saying that such a demand is one which the statute contemplates. Such a demand does not comply with either the language or the spirit of the statute. It is therefore submitted that, as to the claim for interest, there was no sum certain which was payable, and that even the £4,000 and the £2,000—although they were certain in one sense—were thrown into the general account, and have been so treated by the court.

The decision in *McIntosh v. Great Western Railway Company* (¹), in regard to interest, is quite inconsistent with the statute 3 & 4 Will. 4, and with all that was perfectly well recognized before that statute was passed, and therefore it ought not to be followed. In his judgment in that case [166] Vice-Chancellor Stuart referred to **Calton v. Bragg* (²), which was decided before the statute, and at a time when the law was somewhat unsettled; but after that case, and even before the statute, the law was perfectly well settled, as the case of *Higgins v. Sargent* (³) shows. The plaintiff in that case recovered in an action on a life policy and claimed interest, but it was not allowed. The Vice-Chancellor referred to the *Duchess of Marlborough v. Strong* (⁴), but there is nothing in that case to support the view that interest ought to have been paid by the Great Western Railway Company. The case of *Mildmay v. Methuen* (⁵) was also referred to, but it does not appear there what demand in writing had been made, and yet Vice-Chancellor Kindersley's judgment proceeds upon the footing that a proper demand was made. The distinction between that case and the present is obvious enough, for the plaintiff there carried

(¹) 4 Giff., 683.

(²) 15 East, 223.

(³) 2 B. & C., 348.

(⁴) 4 Bro. P. C., 539; 14 Vin. Ab., 458.

(⁵) 3 Drew., 91.

in a claim for a sum certain, and it was substantially supported and allowed, although with a deduction.

[The VICE-CHANCELLOR referred to *Tew v. Lord Winter-ton* (*).]

That case has no particular bearing on the present. The Vice-Chancellor, in *McIntosh v. Great Western Railway Company* (*), considered that these are cases of compensation, and not of account properly so called. If that be so, they are not cases of debts or sums certain. The moment the question is one of compensation as distinguished from one of computation, the claim cannot be brought within the statute as a claim for a debt or sum certain, and at no time before the chief clerk's certificate was there any sum certain payable under these contracts. It may be observed that there was an appeal in *McIntosh v. Great Western Railway Company*, and that there was a compromise.

[They also cited *Rhodes v. Rhodes* (*).]

On the question of costs, we submit that in such a case as this each party ought to pay their own costs, as each has failed to a great extent in their demands: *May v. Biggen-den* (*).

Mr. Dickinson, in reply.

*SIR CHARLES HALL, V.C.: There are two questions [167 remaining to be disposed of in this case, the liability of the defendants to pay interest to the plaintiffs on what has been ascertained to be due to them, and the costs of the suit; and both of them are no doubt of considerable importance, from the magnitude of the litigation and the time which it has occupied. As to the question of interest: The plaintiffs have claimed to be entitled to interest, and they have based their claim to it upon this:—that the contract provided for payments monthly; and that it was contemplated that from time to time certain sums, which would be ascertained at the end of each month, would be paid over, and that therefore the case ought to be considered as one of contract to pay sums at certain specified times, and that interest follows from that. The answer manifestly to that is that to establish a liability to interest it is not ordinarily sufficient to show that certain sums were to be paid at certain times.

According to the contract, if it went on that, apart from the statute, there must be an express contract for the payment of interest, except in the cases of mercantile contracts—bills of exchange and promissory notes, and some cases which are subject to special usage in trade. It must be in

(*) 1 Ves., 451.

(*) 4 Giff., 683.

(*) Joh., 653.

(*) 24 Beav., 207.

the contract itself, and no case has been made out for interest in that view. A case of this kind was, I think, intended to be made by the bill—that, as regarded the liability to interest the plaintiffs' certificates ought to have been made out from time to time—monthly; that there was default in furnishing the certificates; and that being so, that the plaintiffs are entitled, not to interest, but to damages of the same amount in respect of the non-payment monthly, in accordance with the contract. That really is the shape of the bill, and viewed as a claim for such damages as distinguished from a direct claim for interest, it does not appear to me that under all the circumstances of the case such claim can be maintained. There was unquestionably great irregularity in the mode of dealing under the contract, which I cannot attribute solely and entirely to the defendants; and viewing it in that general way, it does not seem to me that the claim to interest is made out under the contract itself. The liability to pay interest, irrespective of the express [68] *provisions in the contract and of the statute, has been clearly settled by the cases which were referred to during the argument of Mr. Lindley. In one of those cases—*Higgins v. Sargent* (*)—the earlier cases were considered and reviewed, for there were earlier authorities in favor of the allowance of interest without express stipulation in the contract. But *Higgins v. Sargent* clearly settled the law in that respect, viz., that in the absence of any express provision in the contract to pay interest, there was no liability to do so; and in another of those cases—*Rhodes v. Rhodes* (°)—the decision was to the same effect. To those two cases I will add *Foster v. Weston* (°). There the defendants bound themselves by deed to make payments at or on the days actually fixed, and it was held that the instrument did not carry interest. Those being the decisions at law, so far as the contract itself is concerned, they must equally bind me in equity, unless there be decisions in equity entitled to equal consideration with those decisions at law, for this is a case in which the plaintiffs are asserting and claiming a legal right. They come here on the ground that the accounts could not be conveniently taken in a court of law; and also on the particular ground that at law the defendants would have been in a situation to set up that which they are not able to do here—the want of the certificates or the want of authority to execute the works in respect of which special relief is asked. But the plaintiffs coming here for relief in respect of those impediments at law, and this court inter-

(*) 2 B. & C., 348.

(°) Joh., 653.

(°) 6 Bing., 709.

fering and protecting the plaintiffs by removing them, the plaintiffs' rights in this court must be dealt with exactly the same as they would be at law, and if they could not get interest at law under the contract, they cannot get it in this court under the contract. It has been contended that there have been decisions in this court which show that the plaintiffs are entitled to interest, and which I cannot disregard. One of the cases referred to is *Mildmay v. Methuen* ('). If that case had been, which it is not, so far as I can collect from the report, seriously argued, considered, and decided with reference to the authorities at law, I should have had some difficulty in dealing with it; but it does not appear that a single case was referred to, *and what was relied on [169 was the statute. That case, therefore, is no authority whatever in favor of the plaintiffs independently of the statute. The case of *McIntosh v. Great Western Railway Company* (') would seem to be an authority independently of the statute. The Vice-Chancellor Stewart, however, did not, in his judgment as to interest, refer to the cases which I have already mentioned, but he seems to have gone on some earlier authorities which, in the cases to which I have referred, were reviewed and considered to be no longer applicable at law. Under all the circumstances of that case, and treating this question as one of legal right, I do not consider that that case is an authority in favor of the plaintiffs for the allowance of interest. I come now to consider the effect of the statute. There are two sections which relate to interest, but the 28th is the material one. In this case there was a "demand of payment" made by the letter which has been referred to. That demand was for a sum of between £13,000 and £14,000 as being due to the plaintiffs, and it was contended that that was a demand in respect of which interest can be claimed under that section, although the demand succeeded to the extent only of less than half the amount demanded, and although the amount actually awarded and ascertained to be due ultimately was not even altogether part, or simply part, of that sum. That balance was ascertained after an investigation of a very long account, by no means confined to the £13,000 odd and the other items composing it. Independently of any authority on the point, I should have said that this was not a case in which within the meaning of that section there had been a demand made in writing of a sum certain payable at a certain time. In *Mildmay v. Methuen* ('), there was a demand for a sum of £10,000 and odd, from which a deduction of £1,500 and odd

(') 8 Drew., 91.

(') 4 Giff., 683.

was made on investigation of the accounts, and interest was allowed on the balance. The statute was referred to and was relied on as entitling the claimant to interest, but the argument seems to have been very brief, and the statement of the case and the circumstances under which the reference was made to an architect to ascertain the amount, are not set forth with that amount of detail which would make the decision in the case satisfactory under any circumstances, *and the nature of the deduction is not explained. No authority was referred to, and the judgment of the Vice-Chancellor is not a very full one. The impression on the Vice-Chancellor's mind was that it was a case of a debt or sum certain; and he declared that the claimant was entitled to interest at 4 per cent. from the date of his demand. It does not appear from the report whether it was a debt certain or a sum certain payable at a certain day;—there is not a word about that in the argument, but the Vice-Chancellor seems to have been influenced by the consideration of the 29th section of the statute, which enables the jury on the trial of any issue, or on any inquiry of damages, to give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure, and over and above the money recoverable. But that is a special clause applicable to trespass and trover, and to policies of assurance, in reference to which last-mentioned interest had, in the older cases, been allowed. The Vice-Chancellor seems to have considered that the 29th section assisted him in coming to a conclusion upon the construction of the 28th section; but I am at a loss to understand that, for the 29th section does not deal with sums certain at all except in so far as a sum assured may or may not be a sum certain. I do not consider the decision in that case satisfactory, nor one which ought to guide me in coming to a conclusion in this case, if independently of it I should come to a different conclusion, which, under all the circumstances of this case, I certainly should come to. Even supposing that I could treat the present as a case within the 28th section, that section is not imperative; it merely empowers a jury, if "they shall think fit," to allow interest at a rate not exceeding a certain amount. Those words give a discretion to the jury to say whether it be, under all the circumstances of it, a case in which interest ought to be allowed or not. A new trial would not, I think, be granted, because the jury had not allowed interest under that section in a case like the present. I do not believe that any twelve men dealing with and considering all the circum-

stances of this case, would say that interest ought to be allowed ; and, acting as a jury in this case, it appears to me that I cannot allow interest except from the date of the chief clerk's *certificate, and it has been conceded that [17] interest must be paid from that time.

As to the costs of the suit : The plaintiffs have succeeded only to the extent of something less than one-half of their entire demand, but having regard to the nature and circumstances of the case, the way in which the plaintiffs were met, the contention on the part of the defendants that the plaintiffs were entitled to nothing, the decisions in the case of *Jeffryes v. Agra and Masterman's Bank* (*) and *May v. Biggenden* (*), and the fact that the defendants have substantially been the cause of the litigation, I am of opinion that they must pay the costs of the suit. Mr. Buckton was made a defendant for the purpose of discovery, and I think under circumstances which entirely justified the plaintiffs in taking that course ; and the plaintiffs having been ordered to pay his costs, but with a reservation of the question of how they were ultimately to be borne, I shall now order that his costs be added to the costs of the plaintiffs, and that the defendants do pay them with the plaintiffs' other costs of the suit. Then as to the rate of interest to be paid from the date of the chief clerk's certificate, Vice-Chancellor Stuart thought that 5 per cent. ought to be allowed, and as I consider that this really is a case which ought to be dealt with according to the legal rights, and as I believe that at law it would be given, I shall order that 5 per cent. be now paid by the defendants from the date mentioned.

Solicitors : Mr. John Turner, agent for Messrs. C. C. Lewis & Son, Brentwood ; Mr. J. B. Batten.

(*) Law Rep., 2 Eq., 674.

(*) 24 Beav., 287.

[Law Reports, 18 Equity Cases, 172.]

M. R., April 21, 1874.

172] *ATTORNEY-GENERAL V. COCKERMOUTH LOCAL BOARD.

[1871 A. 181.]

Public Body—Parliamentary Powers—Information—Injury to the Public—Nuisance—Pollution of Stream—Local Board—Sewage Works—Outfall without District—Public Health Act, 1848 (11 & 12 Vict. c. 63), ss. 45, 46—Local Government Act (1858) Amendment Act, 1861 (24 & 25 Vict. c. 61), s. 4.

Upon an information filed by the Attorney-General to restrain a public body from transgressing powers conferred by an act of Parliament, it is not necessary to prove that injury to the public will result from the acts complained of; and in this respect there is no difference between an *ex-officio* information and an information at the relation of a private individual.

The Local Government Act (1858) Amendment Act, 1861 (24 & 25 Vict. c. 61), s. 4, enables local boards to execute works without their districts for the purpose of the outfall or distribution of sewage, subject to the following proviso: "That nothing herein contained shall give or be construed to give power to any local board to construct or use any outfall, drain, or sewer for the purpose of conveying sewage or filthy water into any natural watercourse or stream until such sewage or filthy or refuse water be freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in such stream or watercourse":

Held, that a local board is not entitled to discharge sewage by an outfall out of their district into a river so as to affect or deteriorate the water at the point of discharge.

The C. local board discharged sewage into a river by an outfall out of their district so as to pollute the water at the point of discharge; but such pollution was imperceptible at the town of W., situated eight miles farther down, and supplied with water for domestic purposes from the river. Upon an information and bill filed by the local board of W. (in whom the W. water-works were vested), as relators and plaintiffs seeking to restrain the C. local board from so discharging the sewage, on the ground that their acts were, first, an infringement of the above-mentioned provisions of the Local Government Act, 1861, and secondly, a nuisance to the inhabitants of W.:

Held, that upon the information an injunction to restrain the defendants from infringing the act of Parliament must be granted with costs; but that the bill, which sought to make out a case of nuisance, must be dismissed with costs.

THIS was a suit by information and bill, in which John Askew, the clerk of the Workington Local Government Board was relator, and the Workington Local Board and the [173] said John Askew were *plaintiffs; the Cockermouth Local Government Board and their clerk being the defendants.

The town of Workington is situated at the mouth of the river Derwent, from which it derives a supply of water for domestic purposes, the water-works being vested in the Local Board. The town of Cockermouth is situated about eight miles higher up the same river. The Cockermouth Local

Board had constructed works for removing the sewage of the town with an outfall into the river Derwent. This outfall was situated without the district of the Cockermouth Local Board. Such works and outfall were constructed by virtue of the powers conferred by the Public Health Act, 1848 (11 & 12 Vict. c. 63), and the Local Government Act (1858) Amendment Act, 1861 (24 & 25 Vict. c. 61), the material provisions of which acts are set out beneath⁽¹⁾.

*The relator and plaintiffs alleged that the Cocker- [174
mouth Local Board were using the outfall into the river Derwent for the purpose of conveying the sewage and filthy water from the town of Cockermouth into that river without first freeing such sewage and filthy water from all excrementitious and other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in such stream or watercourse; and that such acts, and others committed by the said board, were a serious nuisance, and, if continued, would injuriously affect the health and com-

(1) 11 & 12 Vict. c. 63, s. 45: "The local board of health shall from time to time repair the sewers vested in them by this act, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this act; and the said local board may carry any such sewers through, across, or under any turnpike road, or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriage way of any street, and after reasonable notice in writing in that behalf (if upon the report of the surveyor it should appear to be necessary), into, through, or under any lands whatsoever; and the said local board may from time to time enlarge, lessen, alter, arch over, or otherwise improve all or any of the sewers vested in them by this act, and discontinue, close up, or destroy such of them as they may deem to have become unnecessary: Provided always, that the discontinuance, closing up, or destruction of any sewer shall be so done as not to create a nuisance; and if by reason thereof any person is deprived of the lawful use of any sewer, the said local board shall provide some other sewer as effectual for his use as the one of which he is so deprived."

Sect. 46: "The local board of health shall cause the sewers vested in them by this act to be constructed, covered, and kept so as not to be a nuisance or

injurious to health, and to be properly cleared, cleansed, and emptied, and for the purpose of clearing, cleansing, and emptying the same they may construct and place, either above or underground, such reservoirs, sluices, engines, and other works as may be necessary, and may cause all or any of such sewers to communicate with and be emptied into such places as may be fit and necessary, or to cause the sewage and refuse therefrom to be collected for sale for any purpose whatsoever, but so as not to create a nuisance."

24 & 25 Vict. c. 61, s. 4: "Local boards may exercise the powers given by the 45th section of the Public Health Act, 1848, also without their district, for the purpose of outfall or distribution of sewage, upon making due compensation, to be settled in the manner provided in the 144th section of the Public Health Act, 1848: Provided always, that nothing herein contained shall give or be construed to give power to any local board to construct or use any outfall, drain, or sewer for the purpose of conveying sewage or filthy water into any natural watercourse or stream until such sewage or filthy or refuse water be freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in such stream or water-course."

fort of the inhabitants of the town of Workington; and they prayed for an injunction to restrain the Cockermouth Local Board from so doing.

The cause now came on to be heard.

The evidence showed that, although the water of the Derwent was more or less polluted in the neighborhood of the outfall, chemical analysis failed to detect any pollution in water taken from the river at the intake of the Workington water-works. Dr. Frankland, of the Royal College of Chemistry, one of the Rivers Pollution Commissioners, and the principal scientific witness for the plaintiffs, deposed with reference to this as follows: "No sewage can be admitted into a river without deteriorating the quality of the water. The deterioration for washing and manufacturing purposes may be, as in this case, insignificant or imperceptible; but for drinking and cooking such water becomes dangerous, because, as the Rivers Pollution Commissioners have shown, the sewage matter is not perceptibly altered in its character by a flow of seven miles, and scarcely diminished in quantity. Neither does the failure of chemical analysis to detect any deleterious ingredient indicate that danger is absent, since the nature of the noxious ingredients which propagate small-pox, scarlet fever, typhoid fever, or cholera is unknown, and chemical analysis is therefore powerless to detect these ingredients. Moreover, as I proved in 1866, when I published the results of my experiments in the weekly [75] return of the Registrar General, chemical analysis cannot distinguish between pure river water and the same water after it has been mixed with 1000th of its volume of the dejections of a man dying of cholera; although there can be no doubt that the prevalence in Cockermouth of epidemics which are propagated by water, such as cholera or typhoid fever, would seriously imperil the health of the inhabitants of Workington, who would thus be made to drink in a diluted form the dejections of the diseased persons."

The defendants adduced some evidence tending to show that these views of Dr. Frankland were not shared by other scientific men.

Mr. *Southgate*, Q.C., Mr. *Speed*, and Mr. *Parkin*, for the relators and plaintiffs, submitted that they were entitled to a decree on the information, the evidence clearly showing that the defendants discharged sewage into the river Derwent in total disregard of the provisions of the Local Government Act (1858) Amendment Act, 1861, s. 4. They also contended

that, on the evidence, the plaintiffs were entitled to an injunction on the ground of nuisance.

The MASTER OF THE ROLLS expressed his opinion that no case of nuisance was made out, and called on the counsel for the defendants only as to the case made upon the information, and the costs of the bill.

Mr. *Fry*, Q.C., and Mr. *Davey*, for the defendants: This case, so far as it is founded on nuisance, is exactly within *Attorney-General v. Mayor of Kingston* (¹), and the bill ought, therefore, to be dismissed with costs.

Then as to the information. If the outfall were within the district of the Cockermouth Local Board, there would be no ground whatever for the interference of the court at all. As the outfall is beyond their district, the board are subject to the proviso contained in sect. 4 of the Local Government Act Amendment Act, 1861. Now if Dr. Frankland's theory be true, it is impossible to discharge sewage into any natural watercourse without contravening that proviso; and if so, the proviso is simply void. The court, however, *will [176 endeavor to put a reasonable interpretation on the clause, and we submit that all that the Cockermouth Local Board are bound to do is to take care that the water of the Derwent, as a whole, is not deteriorated; there must not be such deterioration of the water as to amount to a nuisance as defined in *Walter v. Selfe* (²).

[The MASTER OF THE ROLLS referred to sect. 46 of the Public Health Act, 1848, and to *Attorney-General v. Leeds Corporation* (³), as showing that the local board could not in any case create a nuisance.]

We say that although this may be so, still the proviso, when fairly construed, means no more, and it may have been inserted *ex majori cautela*.

Even if a stricter interpretation is given to the clause, the court will not interfere unless some damage is proved, and there is no proof of any here.

[The MASTER OF THE ROLLS: In *Attorney-General v. Oxford, Worcester, and Wolverhampton Railway Company* (⁴) an information was filed to restrain the company from working one line of rails, the act of Parliament providing that there should be two. I was one of the counsel for the company, and our defence, which we fully proved, was, that a single line of railway could be worked with safety and great advantage, and had been worked for months without an accident; but the court held that

(¹) 34 L. J. (Ch.), 481.

(²) 4 De G. & Sm., 315, 322.

(³) Law Rep., 5 Ch., 583.

(⁴) 2 W. R., 330.

that question was one for the legislature, and decided against us.]

In that case the information was *ex-officio*.

[The MASTER OF THE ROLLS: Except for the purposes of costs, there is no difference between an *ex-officio* information and an information at the relation of a private individual. In both cases the Sovereign, as *parens patriæ*, sues by the Attorney-General.]

The Sovereign sues on behalf of the public; but if the public is not injured, the suit cannot be maintained. Suppose this were the case of a mountain brook, of the water of which no human being ever drank, with not even a house in the neighborhood, could a suit at the instance of the Attorney-General be maintained? The cases of *Attorney-General v. Mayor of Kingston* (') and *Attorney-General v. Gee* (") show that the Attorney-General, suing at the relation of a private individual, must prove damage.

SIR G. JESSEL, M.R.: The defendants in this case are a public body authorized by act of Parliament to construct sewage works so that they shall not be a nuisance. Under the powers originally conferred on them, they could not make outfall works outside their district, but a subsequent act of Parliament enabled them to go outside their district; that is to say, they may now take people's lands, and so on, and do what certainly is very likely to be unpleasant to the inhabitants of another district which is not benefited by the works. But these powers are subject to this proviso: [His honor read sect. 4 of the Local Government Act Amendment Act, 1861.] I do not mean to say that clause might not by possibility have been better drawn or expressed, but I think the meaning is pretty plain, and it means this: "You shall not send your sewage water into a natural stream until you have made it wholesome water—until you have got rid of all the noxious matter in it." That, I think, is the effect of the clause, and if that is the meaning, the next point is, what water is it that is not to be affected or deteriorated? You are not to affect or deteriorate the water in the river: what portion of the water? I cannot accede to the argument of the defendants that it merely means that you must not poison the whole river; for a river may be hundreds of miles long. I think it must mean that you are not to affect or deteriorate the water in the river at the point where the outfall is; and that if you at that point pollute the water you shall not enjoy the privilege given to you by this act of Parliament of making an outfall outside

(') 34 L. J. (Ch.), 481.

(") Law Rep., 10 Eq., 131.

your district. The act gives you a privilege, and gives it on these terms.

The next question is a question of fact, and there really is no contest upon it. There are several witnesses on behalf of the informant who say that at various times—fifteen times in all within about a year—they have gone and seen the sewage fall directly into the river without passing through the tanks in which it is *supposed to be purified; and [178 even where it does pass through the tanks, no witness on the part of the defendants will say the water is pure; the witnesses for the defendants all speak with certain very remarkable qualifications, such as “practically,” or some word of that kind, or some qualification or other. Nobody says that the sewage does not deteriorate the quality of the water at that place, and there is really no contest about the matter.

In that state of the case I am of opinion that the defendants have infringed the terms of the act of Parliament, and that if they take the privilege at all they can only take it subject to such terms as are imposed by the act of Parliament.

Then this is an information by the Attorney-General against a public body, to enforce the terms of a public act of Parliament. Now, if I understand the law upon the subject, it is not necessary for the Attorney-General to show any injury at all. The legislature is of opinion that certain acts will produce injury, and that is enough. The case I have already referred to of the *Attorney-General v. Oxford, Worcester, and Wolverhampton Railway Company* (¹), is in point; there the Attorney-General would not even answer the affidavits of the defendants to show there was no injury caused by the proceedings they were adopting. The legislature is of opinion that it is desirable to preserve our natural streams in at least their present state of purity; it therefore has said that you shall not affect or deteriorate the water at all; and the court must assume that the deterioration of the water is an injury which is prohibited by the legislature for good and sufficient cause.

Again, if I look at the evidence in the case, I can see very good reason for the course adopted by the legislature. We had the evidence of scientific men to this effect, that there is always a probability of danger when sewage matter is thrown into a stream, because people may drink of that stream, and if any epidemic disease is prevalent in a town from which the sewage matter proceeds, that disease may be

(¹) 2 W. R., 330.

communicated to the inhabitants of another town by the water. Well, that alone would be sufficient justification for the legislature, if it entertained that opinion, inserting this [179] enactment in the act of Parliament. That being *so, I think I am bound, as regards the information, to grant an injunction to restrain the defendants from infringing the provisions of the act of Parliament.

The bill stands upon a totally different footing. It is a bill by the Local Board of Workington, alleging nuisance committed by the defendants. Now I must say I cannot find any evidence of nuisance caused by the defendants' acts. The sewage is thrown into the river in comparatively small quantities, at a distance of eight or nine miles from the town of Workington. The water has been carefully analyzed at the intake at Workington, and no trace of the sewage can be discovered; that is to say, from some cause or other that which was polluted water at or near the outfall has ceased to be polluted water by the time it arrives at Workington. That I take to be the effect of the evidence, and if the plaintiff board can only sue on the ground of nuisance, and they cannot prove nuisance, it follows that their bill must be dismissed. The only remaining question is one of costs. Both parties are public bodies, and I cannot see why I should make the Cockermouth people pay costs incurred wrongly by the Workington people, or *vice versa*. I think the right course, therefore, is to dismiss the bill with costs, and to grant the injunction on the information also with costs, leaving the Taxing Master to set off one against the other. This course has in these cases the effect of giving the bulk of the costs really to the party which obtains the decree. That, however, is for the Taxing Master and not for me.

The injunction will follow exactly the terms of the act of Parliament.

Solicitors: Messrs. Wood & Tinkler, agents for Mr. Tom Millburn, Workington; Messrs. Bischoff, Bompas & Bischoff, agents for Mr. Edward Waugh, Cockermouth.

One who is injured by the deposit in a public river of mash from a brewery sustains a special injury which entitles him to maintain an action for its suppression: *Mayor, etc., v. Baumberger*, 7 Robertson, 219.

Provided he be the owner of the bed of the river: *Hudson River, etc., v. Loeb*, 7 Robertson, 418.

If the water of a stream becomes pol-

luted by the emptying into it of city sewers, so that a riparian proprietor cannot use it in his business as he has before been accustomed to do, he cannot recover against the city for the pollution, so far as it is attributable to the plan of sewerage adopted by the city; but he can recover for it so far as it is attributable to the improper construction or unreasonable use of the sewers,

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or to the negligence or other fault of the city in the care or management of them : *Merrifield v. City of Worcester*, 110 Mass., 216.

The filling up by the city of Providence, by means of a sewer, of any portion of its harbor to the injury of navigation, is an indictable offence; but an individual who has suffered any special damages may recover, in a civil action, his damages caused by such injury, although they are occasioned by what is in itself a public nuisance. A riparian owner of land bounded by navigable water has a right of access to such navigable water, of which he cannot be lawfully deprived; and any one doing anything in front of the land of such a riparian proprietor which makes it less accessible is liable in damages therefor : *Clark v. Peckham*, 10 Rhode Island, 35.

It has been held in Pennsylvania that a city is liable for appropriating the waters of a public river, so that the navigation thereof is impaired and the

plaintiff's vessel thereby detained : *City of Philadelphia v. Collins*, 68 Penn. St. R., 106; *City of Philadelphia v. Gilmartin*, 71 Penn. St. R., 140.

But in Michigan where the plaintiffs alleged in their complaint that they were manufacturers of lumber for market on various places on Lake Michigan in the states of Michigan, Illinois and Wisconsin, but alleged nothing to show that the lumber was destined for any particular market, or that any particular market was lost to the plaintiffs, it does not connect the loss of the Chicago market or of any particular market, or the scale of prices in any such market with the cause of damages from obstruction of the passage of rafts in a public stream or dam; and the loss of the Chicago market cannot be regarded as the necessary result of the detention of the rafts in the stream, or as a consequence legally imported by the facts pleaded : *Powers v. Irish*, 23 Michigan, 429.

[Law Reports, 18 Equity Cases, 180.]

M.R., Feb. 18, 1874.

*CROSSLEY v. MAYCOCK.

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[1874 C. 21.]

Vendor and Purchaser—Specific Performance—Conditional Acceptance—Conditions of Sale.

Where the vendors of land, in a letter acknowledging the receipt of an offer by intending purchasers, wrote as follows: "Which offer we accept, and now hand you two copies of conditions of sale," and therewith enclosed a formal agreement with conditions of a special character:

Held, that the acceptance was only conditional, and that there was no final agreement of which specific performance could be enforced as against the purchasers.

DEMURRER.

This was a suit by vendors for the specific performance of a contract for the sale of land.

The bill alleged that the defendants offered to purchase the plot of land in question by a letter dated October, 1873, which was in the following terms:

"We beg to submit our offer for the plot of land on the east side of Tuel Lane, viz., £2 per yard superficial; the purchase to be completed and possession given upon or before the 21st of Jan., 1874":

That the plaintiffs sent the following answer to the defendants, dated the 27th of October, 1873:

"We are in receipt of your note offering us £2 per superficial yard for the plot of land on the east side of Tuel Lane, which offer we accept, and now hand you two copies of conditions of sale, which we have signed; we will thank you to sign same, and return one of the copies to us":

That the conditions of sale referred to in the above letter (which were set out in the bill) were prepared in duplicate, signed by the plaintiffs, and enclosed with the letter to the defendants, and after reciting that the plaintiffs had agreed to sell and the defendants to buy the piece of land therein described, various stipulations were made as to the delivery [181] of the abstract, the time within *which objections should be made to the title, and the time when the purchase should be completed:

That the defendants did not sign the agreement containing the conditions of sale, and that they subsequently refused to complete the contract.

The bill prayed a declaration that the said two letters created a binding contract for the sale and purchase of the said plot of land, which ought to be specifically performed.

Mr. *Southgate*, Q.C., and Mr. *North*, in support of the demurrer.

Mr. *Fry*, Q.C., and Mr. *Jolliffe*, in support of the bill, contended that the two letters constituted a binding contract, and that the reference in the plaintiffs' letter to the conditions of sale did not render the acceptance of the defendants' offer a qualified acceptance: *Fowle v. Freeman* (1); *Gibbins v. Board of Management of Metropolitan Asylum District* (2); *Skinner v. M' Douall* (3); *Chinnock v. Marchioness of Ely* (4).

SIR G. JESSEL, M.R.: The only question in this case is, what is the true construction of the letter of the plaintiffs of the 27th of October, 1873. The defendants had written to the plaintiffs, offering to purchase the land in question, to which the plaintiffs replied as follows:

"We are in receipt of your note offering £2 per yard for the plot of land, which offer we accept, and now hand you two copies of conditions of sale, which we have signed; we will thank you to sign same, and return one of the copies to us."

The principle which governs these cases is plain. If there is a simple acceptance of an offer to purchase, accompanied by

(1) 9 Ves., 351.

(2) 11 Beav., 1.

(3) 2 De G. & Sm., 265.

(4) 4 D. J. & S., 638.

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a statement that the acceptor desires that the arrangement should be put into some more formal terms, the mere reference to such a proposal will not prevent the court from enforcing the final agreement so arrived at. But if the agreement is made subject to certain conditions then specified or to be specified by the party *making it, or by his soli- [182] citor, then, until those conditions are accepted, there is no final agreement such as the court will enforce.

Here the allegation is that the agreement was subject to certain conditions of sale, which were very special, and such as no purchaser would be bound to accept under an open contract. I am of opinion that the acceptance was only conditional, and that there was no final contract.

The demurrer must be allowed.

Solicitors for the plaintiffs: Messrs. *Bower & Cotton*, agents for Mr. *F. Jubb, Halifax*.

Solicitors for the defendants: Messrs. *Pritchard, Englefield & Co.*, agents for Messrs. *Grundy & Kershaw, Manchester*.

[Law Reports, 18 Equity Cases, 182.]

M.R., April 25, 1874.

LACEY V. HILL.

[1870 L. 94.]

CROWLEY'S CLAIM.

Principal and Agent—Stockbroker—Insolvency of Principal—Default of Broker on Stock Exchange—Closing of Account—Indemnity of Broker—Custom of Stock Exchange.

By the usage of the London Stock Exchange stockbrokers who have entered into contracts for the purchase of stock are, in the event of the insolvency of their principal, justified in immediately selling the stock. A principal is insolvent within the meaning of this rule when he is unable to pay his debts in the ordinary course of business.

In equity an agent is entitled to be indemnified against liability, as well as loss, incurred on behalf of the principal.

Messrs. C., brokers on the London Stock Exchange, on behalf of Sir R. H., entered into contracts for the purchase of stocks to be completed on the 15th of July, 1870. On the 12th of July they wrote to Sir R. H. to the effect that unless he paid them on the 15th a balance (which consisted of the difference between the contract price of the stock and the value thereof at the market price of the day) owing to them from him they would be defaulters; but that if such payment were made, they would sell or continue the stocks, as he thought fit. Sir R. H. promised to pay, and directed them to deal with the stocks as they thought best, and they sold part and continued part. Sir R. H. did not pay on the 15th, but shot himself; on the *next day [183] a bank of which he was a partner stopped payment, and on the 19th he died. On the 16th Messrs. C. were (solely by reason of Sir R. H.'s failure to pay them) declared

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defaulters on the Stock Exchange, and ceased to be members of that body, and, in accordance with the rules, all their transactions for Sir R. H. were closed, and all the stocks they had continued for Sir R. H. were sold at the price of the day. In consequence of the value of the stocks having fallen, the balance appearing to be due to them from Sir R. H. was thus largely increased. The stocks afterwards continued to fall in value. Messrs. C. afterwards paid 6s. 8d. in the pound on their Stock Exchange debts, and were readmitted as members of the Stock Exchange:

Held, that the sale was justifiable, both under the usage of the Stock Exchange (which entitles a broker to sell upon his principal becoming insolvent) and also because the continuation was only effected on the representation of Sir R. H. that he would pay on the 15th:

Held, also, that although Messrs. C. had not paid their debts in full; they were entitled to prove against Sir R. H.'s estate for the increased balance appearing due to them after the sales were effected.

MESSRS. CROWLEY were brokers on the London Stock Exchange, and had been employed in that capacity by Sir Robert Harvey, a banker at Norwich. Prior to July, 1870, they had bought for him, on the Stock Exchange, large quantities of Spanish and other stocks, and from time to time, according to his orders, resold part of the stocks so bought; but they never themselves actually took off the market or paid for any of such stock. On the 12th of July, 1870, Messrs. Crowley had entered into contracts for the purchase of a large quantity of such stock, to be completed on the next settling-day, Friday, the 15th of July, 1870. Being personally liable on these contracts, and anxious as to the fulfilment of them, they, on the 12th of July, wrote to Sir Robert Harvey a letter from which the following is an extract:

"The position is simply this. We depend entirely on you; if you pay us in full on Friday, we can face our other difficulties, but if you do not we cannot stand. Hence the tone of our last two or three letters.

"If we had to succumb it would necessitate the closing of your account at perhaps an unfortunate moment, and your name would be divulged, a thing we very much dread having to do.

"It is also necessary we should know to-morrow morning early how affairs are to go. If we are to continue we must do it boldly, and we cannot do that if we are in any doubt about being able to pay up differences on Friday.

184] *—"We look to you therefore to come, or write, or telegraph an assurance to support, or directions to close, as the case may be. For your guidance we have gone through your account, and at to-night's closing prices the differences due from you would be about £20,000; to-morrow may alter that."

On the following day, the 13th of July, Sir Robert Harvey sent, in reply to Messrs. Crowley's letter, a telegram in

the following terms: "Do just what suits you best; I will settle all you say on Friday morning."

Acting on this telegram, Messrs. Crowley, on the 13th of July, closed the transaction as to part of the stock they had contracted to purchase by selling such part for the 15th of July; and they "continued" the contracts as to a further part of the stock. According to the practice of the Stock Exchange, such continuation is effected by the vendor of the stock (in consideration of a payment to him by the purchaser) entering into two contracts with the purchaser; one a contract for the purchase of the same amount of stock as he has contracted to sell (such contract to be completed on the next settling-day, so as to cancel the subsisting contract), and the other, a fresh contract for the sale of the same amount of stock, to be completed on the settling-day next but one, which in the present case was the 30th of July.

On the same 13th of July, Messrs. Crowley by letter informed Sir Robert Harvey what stocks they had sold and continued respectively, and advised him to sell a still further portion of the stocks. At the same time they sent him a statement of account, by which it appeared that, taking the stocks they had contracted to buy on his account at the price of the day, he was indebted to them to the amount of £15,912 12s. 1d.

On the 14th of July Sir Robert Harvey sent to Messrs. Crowley a telegram, directing them to sell a further portion of the stocks, and also promising to settle all on Friday morning. Messrs. Crowley sold part of the stock mentioned in this telegram, but did not sell the rest in consequence of a heavy fall (of 8 or 9 per cent.) taking place in the price thereof, and they referred to Sir Robert Harvey for further instructions on the subject.

Sir Robert Harvey did not give any further instructions or fulfil his promise to pay Messrs. Crowley on the 15th of July, but shot *himself on the afternoon of that day. [185 On the 16th of July his bank stopped payment. On the 19th of July he died.

Messrs. Crowley, in consequence of Sir Robert Harvey's failure to make the promised payment, and (as appeared by the evidence) in consequence of that alone, were, on the 16th of July, declared defaulters, and in accordance with the rules⁽¹⁾ of the Stock Exchange all their transactions were

(1) The following are the material rules:

"142. A member unable to fulfil his engagements shall be publicly declared a defaulter by direction of the chairman,

deputy-chairman, or any two members of the committee.

"143. A member declared a defaulter on the Stock Exchange . . . ceases to be a member."

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peremptorily closed, and their accounts made up by the official assignees at the price current on that day. Such price current was less than that of the 13th of July, and the result was that the balance appearing by their books against Sir Robert Harvey was increased to £20,482 17s. 4d.

Messrs. Crowley subsequently paid 6s. 8d. in the pound on their Stock Exchange debts, and they assigned the sum of £7,101 18s. 2d., part of the debt due to them from Sir Robert Harvey, to trustees, for their Stock Exchange creditors; and in October, 1870, they were readmitted members of the Stock Exchange.

The rules of the Stock Exchange do not define the effect of readmission. Mr. De Zoete, the chairman of the committee of the Stock Exchange, gave evidence to the effect that readmission is not *equivalent to a legal discharge of Stock Exchange debts; that there is no discharge except by payment of all liabilities in full; that one member is not allowed to sue another member without the permission of the committee; but that every year upon the readmission of members the committee specially considered the position of members who had been declared defaulters, and if they thought that the member was in a position to make some further payment, they intimated their opinion to him; and that it thus practically resulted from the action of the committee that payments were from time to time made by members according to their ability towards the liquidation of old liabilities.

The suit of *Lacey v. Hill* was instituted by creditors for the administration of Sir R. Harvey's estate, and Messrs. Crowley carried in a claim in the suit, against the estate, to the amount of £20,482 17s. 4d. This claim was not disputed to the extent of £15,912 12s. 1d., being the amount appear-

"158. A defaulter shall not be eligible for readmission who shall not have paid from his own resources, independently of his security money, at least one-third of the balance of any loss that may occur on his transactions, whether on his own account or that of principals; or who, in the event of his debts being less than the amount which his sureties may be called upon to pay, shall not have refunded to the sureties one-third of the amount paid by them."

"167. Two or more members shall be appointed annually by the committee to act as official assignees, whose duty it shall be to obtain from a defaulter his original books of account, and a

statement of the sums owing to and by him, to attend meetings of creditors, to summon the defaulter before such meetings; to enter into a strict examination of every account; to investigate any bargains suspected to have been effected at unfair prices, and to manage the estate in conformity with the direction of the majority of the creditors present."

"169. The official assignees shall publicly fix the prices at which a defaulter's transactions shall be closed, such prices to be those current in the market immediately before the declaration; but, in the event of a dispute as to the prices named, they shall be fixed by two members of the committee."

ing to be due from Sir Robert Harvey, by the account rendered to him on the 13th of July. The validity of the residue of the claim now came before the court on an adjourned summons.

It appeared from the evidence that where the principal of a broker on the London Stock Exchange has by reason of insolvency, bankruptcy or death, become unable to receive and pay for, or to deliver the stocks and shares which he has ordered to be purchased or sold, and no one is authorized to deal with the account, or able and willing to take the responsibility thereof, then the broker (who as between himself and other members of the Stock Exchange stands in the position of principal, and is liable as such on all contracts for the sale and purchase of stocks and shares), may, by the usage and custom of the Stock Exchange, proceed at the earliest practicable period to close the account of such insolvent principal by selling on the best terms amounts of all stocks or shares equivalent to those he may have contracted to take, and by purchasing amounts of all stocks or shares equivalent to those he may have contracted to deliver.

It appeared that the stocks contracted to be purchased by Messrs. Crowley on Sir Robert Harvey's account continued to fall after the 16th of July, and that if a sale had been postponed until *after the 30th of that month (the [187 settling-day next after the 15th), the amount of the claim would have been greater.

Contract notes relating to all the stocks purchased or continued on Sir R. Harvey's account were duly forwarded to Sir Robert Harvey. These notes were not in evidence, but it was stated at the bar that they were expressed to be subject to the rules and usages of the London Stock Exchange. It was agreed that the contract notes should be formally put in evidence before the order was drawn up, and the judgment was given on the assumption that this would be done.

The *Attorney-General* (Sir R. Baggallay), and Mr. *Dundas Gardiner*, for Messrs. Crowley, relied on the decision in *Scrimgeour's Claim* (1) as governing the present case.

Mr. *Fry*, Q.C., and Mr. *Cozens-Hardy*, for the legal personal representative of Sir Robert Harvey: This case is distinguishable from *Scrimgeour's*. There the stock which was the subject of the claim had been actually bought and taken off the market; and the Lords Justices held that, under the circumstances, brokers had authority to sell the stock. Here everything rested in contract, and Messrs. Crowley would not have been in the like position with Messrs. *Scrim-*

(1) Law Rep., 8 Ch., 921.

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geour until the 31st of July. They actually sold on the 16th, and it is nothing to the purpose to allege that if they had sold on the 31st of July we should have been in a worse position.

[The MASTER OF THE ROLLS: The latter part of Lord Justice Mellish's judgment seems exactly to cover that point and to decide it against you.]

We submit that that judgment must be read with reference to the circumstances of the particular case then before the court, which, as has been pointed out, are different from those of the present case.

Further, the moment Sir Robert Harvey failed to fulfil his promise, the brokers should have elected to sell; if they had done so, the loss would only have amounted to £15,912 12s. 1d., which we are willing to pay.

[188] * [The MASTER OF THE ROLLS: At that time they had agreed to continue the account; they could not leave such a matter as that to the last moment.]

Messrs. Crowley do not bring themselves even within the terms of the rule of the Stock Exchange, if that be valid. The sale took place on the 16th of July, at that time Sir Robert Harvey was not dead, nor had he become bankrupt or insolvent; in fact, it is not certain even now whether his estate may not prove sufficient for payment of all his debts in full.

Again, the case of *Duncan v. Hill* (*) shows that the claim is in the nature of one for indemnity, and although it is sworn in the present case that the claimants' loss has been exclusively caused by the default of Sir Robert Harvey, still they can only recover what they have actually paid, and not the whole amount for which they were liable previously to their readmission to the Stock Exchange. It would have been different, perhaps, if Sir Robert Harvey had entered into a covenant to indemnify them: *Parker v. Lewis* (*); but here the indemnity is only implied.

[The MASTER OF THE ROLLS referred to *Cruse v. Paine* (*).]

Mr. Southgate, Q.C., and Mr. Merewether, for the plaintiffs in the suit, referred to *Collinge v. Heywood* (*), as showing that payment and not mere liability, was required in order to maintain an action on a contract of indemnity. If a mere liability were enough, the party recovering might afterwards compromise for less than he recovered.

SIR G. JESSEL, M.R.: Assuming that the contract notes are produced and verified, I think that the claimants have made out their case.

(1) Law Rep., 8 Ex., 242.

(2) Ibid., 8 Ch., 1035; see p. 1058.

(3) Law Rep., 6 Eq., 641.

(4) 9 A. & E., 633.

The case is simply this: Messrs. Crowley were the brokers of Sir Robert Harvey. In that capacity they bought for him various stocks, Spanish stock amongst the rest; and from time to time, according to his orders, sold the stock. On the 13th of July he owed them some £15,000 on the balance of account; that is, if they had sold all the stock which they had bought for him at the *market price of the [189 day he would have been indebted to them in that amount. They found that they were in this position, that unless Sir Robert Harvey paid them they would be defaulters on the Stock Exchange, and therefore they wrote to him, saying in effect: "The settling-day is Friday, the 15th July, and unless you pay us on that day we shall be defaulters. But if you agree to pay us on that day we can go on with our business, and if you will agree to pay us on that day we will either then continue your account" (which is done by entering into a new series of sales and purchases, that is, they contract to sell what stocks they have bought, and then contract to buy equivalent quantities)—"we will either continue your account or sell, as you think best." He telegraphed that they should sell part; but as to the rest they were either to continue or sell as they pleased, and at the same time he stated that he would pay on the Friday. That of course was a representation on which they could act. They had told him that as honest men they could not continue unless he paid, and that if he did not pay they should be defaulters. He represented that he would pay; and on the strength of that representation they continued a portion of the stocks. He did not pay on the 15th, but made an attempt at suicide. On the 16th they were declared defaulters; that is, they made default on the 15th, and on the 16th they were declared defaulters, and in the usual course their creditors, acting under the Stock Exchange rules, closed their accounts, that is, sold all the stocks they had contracted to buy, including the stocks they had contracted to buy for Sir Robert Harvey.

The first question I have to decide is, was such a sale authorized? It was said the only authority Messrs. Crowley had was to purchase for the next account day, the 30th, and they had no right therefore to sell before that day. I admit that their right to sell before that day is not a right ordinarily possessed by an agent who has contracted to buy for delivery on a future day. I think the right depends on two grounds, and that it is well warranted on both. The first ground is that they did not agree to continue except on the representation by Sir Robert Harvey that he would pay on

the Friday. He left them to continue or not, knowing they could not continue unless they relied on that representation, 190] which *he failed to perform. I agree with Mr. Fry's observation that under that right they were bound to sell soon afterwards, that they had not the right to sell at any future time they pleased ; but the sale took place next morning, and so no time was really lost.

I think they had also a right to sell on another ground. By the rules and usage of the Stock Exchange if the principal dies or becomes insolvent during the currency of the account the broker has a right to sell immediately. It appears that these rules and usages were expressly part of the contract, not only as between the brokers and jobbers from whom Messrs. Crowley purchased, but as between themselves and Sir Robert Harvey, and I have no doubt in this particular instance were perfectly well known to him. What is the meaning of the client becoming insolvent in the sense of the rules ? It is the simple meaning of insolvency as between business men. What happened was this. Sir Robert Harvey attempted to commit suicide on the afternoon of Friday. He was principal partner of the bank at Norwich, and that bank put up its shutters on the next morning and did no more business. It was soon noised abroad that the bank was insolvent, and so the members of the Stock Exchange, people who were interested, were informed. This turned out to be the fact. I am asked to say that that is not evidence of the insolvency of Sir Robert Harvey. Insolvency within the Stock Exchange rule means inability to pay debts in the ordinary commercial sense and in the ordinary course of business. Then what is to be said of a bank that puts up the shutters and does not pay ? Is not that evidence of insolvency ? I hardly know how else a jury exercising the ordinary common sense which is to be attributed to juries could find anybody insolvent unless he came forward and showed that the whole amount of his assets was not equal to the whole amount of his liabilities. I think there was very good evidence, and such evidence as entitled the brokers to act upon it, and therefore they had the right to sell on the second ground also.

Then it is said the brokers made default, and that they have not paid for the stock they purchased for Sir Robert Harvey. But if he has had the stock sold for him, and is credited with the proceeds, what difference can it make to him whether the brokers paid for it, or whether the persons 191] who sold it have chosen to give them *credit for the amount ? He has had the stock, and he has had it sold for

him ; that is, he has been credited with the proceeds. Suppose a man buys a horse or a cargo of corn for his principal, and before the day of the delivery sells, crediting the principal with the proceeds in account, then although the principal has not the thing delivered to him he has the benefit of the sale by being credited with it in account. It appears to me that that is the true view of the present transaction, and it is utterly immaterial whether the broker who has become personally liable for the amount has paid at all. But in addition to this it appears to me the case of a defaulter on the Stock Exchange differs from the case of a bankrupt by the English law. Such a defaulter obtains no discharge from his debts. All that happens is this, unless he pays 6s. 8d. in the pound he is not admitted into the Stock Exchange again, and remains liable to actions by all his creditors. If he pays 6s. 8d. in the pound and is readmitted, then the Stock Exchange committee will not allow any member of the Stock Exchange to sue him without their permission. The object of this is to secure that his assets shall be fairly distributed, and as I understand it, every year a man who has been a defaulter is called upon to show whether he can pay any more, and if he can pay any more he does so till he liquidates the whole debt. So that in point of fact if these gentlemen recover in this suit they will actually have to distribute what they recover amongst their creditors on the Stock Exchange, and will be in no wise released from the payment.

Last of all it is said this is a liability as distinguished from an actual payment, and that the agent or person entitled to be indemnified has no remedy. Whatever may be the case at law (as to which I say nothing, because it is not necessary), it is quite plain that in this court any one having a right to be indemnified has a right to have a sufficient sum set apart for that indemnity. It is not very material to consider whether he is entitled to have that sum paid to him, or whether it must be paid direct over to the creditor. If the creditor is not a party, I believe that it has been decided that the party seeking indemnity may be entitled to have the money paid over to him. As to the observation that he may compromise for less, the answer is, that the person liable to indemnity can go *to the creditor and set him [192 right. It is his own fault that the liability remains. But he is certainly in equity liable to indemnify, and liable to indemnify to the extent of the liability incurred by the agent on his behalf, and that is quite sufficient to substantiate this proof against this estate.

Therefore, on these grounds I shall allow the whole proof, and of course with costs.

Solicitors: Messrs. *Travers Smith & Co.*; Messrs. *Sharpe, Parkers & Co.*, agents for Mr. *Coaks, Norwich*; Messrs. *Linklater & Co.*

See note, 6 Eng. Rep., 809.

[Law Reports, 18 Equity Cases, 192.]

M.R., March 7, 1874.

STEED V. PREECE.

[1868 S. 1.]

Real Estate—Conversion—Infant Tenant in Tail—Sale by Court of Infant's Real Estate—Death of Infant—Devolution of Proceeds of Sale.

Real estate was conveyed to trustees upon trust for two infants as tenants in common in tail, with cross remainders between them. A suit was instituted by the trustees against the *cestuis que trust* for the administration of the trust, and a decree was made after one of the infants had attained twenty-one, by which (the court being of opinion that a sale would be for the benefit of the infant defendant, and the adult defendant consenting) a sale was ordered. A sale was made under the decree, and the purchase-money paid into court; and upon further consideration the adult's share was paid to him, and the infant's share carried to his separate account. The infant afterwards died without having attained twenty-one:

Held, that the fund in court belonged to his legal personal representative, and was not to be treated as realty.

Flanagan v. Flanagan ⁽¹⁾ followed.

Jerny v. Preston ⁽²⁾ and *Cooke v. Dealey* ⁽³⁾ questioned.

By an indenture dated the 29th of May, 1857, certain real estate was assured unto and to the use of Francis Davis and Sarah Preece, their heirs and assigns, in trust for John Preece and Edward Edwin Preece, and the heirs of their respective bodies, in equal shares as tenants in common; and [193] if either of them should die *without issue, then as to the entirety of the premises for the other of them and the heirs of his body; and if both should die without issue, then as to part of the real estate in trust for Sarah Preece for life, and after her death for Francis Davis, his heirs and assigns, and as to the residue of the same real estate upon trust for Francis Davis, his heirs and assigns.

Both John Preece and Edward Edwin Preece were illegitimate, and at the date of the deed were infants aged ten and two years respectively.

Francis Davis died in 1866. In 1867 Sarah Preece intermarried with John Steed.

⁽¹⁾ Cited in *Fletcher v. Ashburner*, 1 B. C. C., 498.

⁽²⁾ 13 Sim., 356.

⁽³⁾ 22 Beav., 196.

In January, 1868, Mr. and Mrs. Steed filed the bill in this suit against John Preece and Edward Edwin Preece, praying that the trusts of the indenture might be administered by the court; that proper directions might be given as to the letting and management of the trust property; that if it should appear to the court necessary or expedient a partition of the trust property between the defendants might be directed; and that provision might be made for the costs of the suit.

John Preece attained twenty-one on the 3d of January, 1868. On the 19th of June, 1868, a decree was made which, after declaring that the trusts ought to be administered, decreeing accordingly, and directing an account of the rents and profits, proceeded as follows: "And his lordship being of opinion that it will be for the benefit of the infant defendant that the premises comprised in the said indenture should be sold, and the defendant John Preece consenting thereto, doth order that the same be sold with the approbation of the judge, the defendant John Preece being at liberty to bid and become the purchaser thereof; and it is ordered that the money to arise from such sale be paid into the bank, with the privy of the Accountant-General of this court, to the credit of this cause, *Steed v. Preece*, 1868 S. 1. And his lordship doth declare that the costs of the said infant defendant are to be a charge upon his share of the said premises. And the further consideration of this cause is adjourned, and any of the parties are to be at liberty to apply as they may be advised."

The property was sold under this decree, and the purchase-money was paid into court.

*By an order made in the suit on the 19th of [194 December, 1868, it was ordered that the costs of the suit of the plaintiffs and defendants should be taxed, including in the costs of the defendant John Preece the costs of enrolling the conveyances of the property to the purchasers; that such costs, when taxed (except the said costs of enrolling the conveyances) should be paid out of the purchase-money in court; that out of one equal moiety of the residue of the said purchase-money the costs of enrolling the conveyances should be paid, and that the residue of the said moiety should be paid to the defendant John Preece; and that the remaining moiety of the purchase-money should be invested in bank annuities in trust in the cause, "the account of the infant defendant Edward Edwin Preece;" and that the dividends to accrue on such bank annuities be paid to the

guardian of the infant defendant, and be applied towards his maintenance; and liberty to apply was given.

A moiety of the fund remaining after payment of costs was accordingly invested in bank annuities and carried to the account directed by the last stated order. The other moiety was paid out to John Preece.

Edward Edwin Preece died on the 6th of January, 1874, without having attained twenty-one, and without issue.

On the 9th of February, 1874, John Preece executed a deed (which was afterwards enrolled in chancery), whereby he purported to bar his estate tail in the said fund in court; and he now presented a petition asking for payment of the fund to himself.

By direction of the court, the petition was served on the Attorney-General.

Mr. *Blackmore*, for the petitioner: The sale of the estate under the order of the court could not alter the devolution of the property. In the first place, I contend that the sale was wholly unauthorized, the court having no jurisdiction to sell purely for the benefit of the infant: *Calvert v. Godfrey* ⁽¹⁾; if so, the right of the petitioner is quite clear. The sale, however, appears to have been made for the purpose of raising costs, in the same way as sales were ordered in [195] *Cox v. Cox* ⁽²⁾, **Hubbard v. Hubbard* ⁽³⁾, *Thackeray v. Parker* ⁽⁴⁾, and *Davis v. Turney* ⁽⁵⁾. If this be so, the sale may be valid so far as regards the safety of the purchaser, but the rights of the parties interested in the property will not be affected: *Jermy v. Preston* ⁽⁶⁾; *Cooke v. Dealey* ⁽⁷⁾. The principle of the last-mentioned case was mentioned with approval in *Dyer v. Dyer* ⁽⁸⁾. The case of *Flanagan v. Flanagan*, cited in *Fletcher v. Ashburner* ⁽⁹⁾, and in the argument in *Ackroyd v. Smithson* ⁽¹⁰⁾, is not inconsistent with these cases, for there the testatrix contemplated a sale of her real estate, and expressly disposed of the surplus proceeds.

Mr. *Hemming*, for the Attorney-General, was not called upon.

SIR G. JESSEL, M.R.: This particular case does not raise all the questions which have been argued.

The facts are very simple. Two persons, one an infant, the other adult, are entitled in equity to real estate as ten-

⁽¹⁾ 6 Beav., 97.

⁽²⁾ 3 K. & J., 554.

⁽³⁾ 2 H. & M., 38.

⁽⁴⁾ 1 N. R., 567.

⁽⁵⁾ 32 Beav., 534.

⁽⁶⁾ 13 Sim., 356.

⁽⁷⁾ 22 Beav., 196.

⁽⁸⁾ 34 Ibid., 504.

⁽⁹⁾ 1 B. C. C., 498.

⁽¹⁰⁾ Ibid., 503.

ants in common in tail, with cross remainders between them. A suit is instituted by trustees for administration of the trusts of the instrument under which these persons are entitled, and a decree is made in this form: [His honor read the decree.] Under that decree the estate is sold, and the purchase-money paid into court; and by the order on further consideration one half of the fund in court is paid to the adult, and the other half is carried over to the ordinary separate account of the infant; and under these circumstances the infant would have been absolutely entitled to that moiety if he had attained twenty-one. The infant, however, died under twenty-one; and thereupon this petition is presented by the adult to have the money paid to him.

The petitioner says that, notwithstanding the decree and order I have mentioned, the proceeds of sale must be treated as realty; that he, being originally tenant in tail in remainder, has barred his estate tail, and is now absolutely entitled to the fund. But *the answer to that is simple: [196 the estate has been sold and turned into money in a suit to which he, being an adult, was party, and that too, so far as the decree is concerned, by his consent. He cannot now be heard to say that that was wrong, first, because it was done by consent; and, secondly, because the decree stands unreversed, and therefore would be binding on him, even if he had not consented. The estate has, therefore, been properly converted into money, and as between volunteers—which both administrators and remaindermen are—it has been laid down that they must take the estate as they find it.

In *Oxenden v. Lord Compton* (1) Lord Loughborough says, speaking of the real and personal representative: "Both are volunteers. Each must take what they find at the death of the person entitled for life, in the condition in which they find it. The legal right is not questioned: then upon what equity must I make this transmutation for the benefit of a person equally a volunteer?" That is the question I have asked here, and it has been suggested that the court was wrong. It is said that the court had power to sell for the purpose of raising costs, but for no other purpose. But if the court had no power to sell generally, how could it sell for costs? An infant has no costs: the costs incurred on his behalf in a suit are the costs of his guardian or next friend; and even if they were his own, I know of no principle by virtue of which the debt of an infant can, apart from a judgment, be charged on his real estate. If, then,

(1) 2 Ves., 69, 70.

the suggestion be that the conversion is altogether wrongful, I am asked to reverse a decree of the court, which I cannot do.

But then it was said that the decree of the court was partially wrong. Now, as to that, the case of *Flanagan v. Flanagan* appears to me unanswerable: [His honor read the statement of this case contained in the judgment in *Fletcher v. Ashburner* (*).] I am aware that the decision of Vice-Chancellor Shadwell in *Jermy v. Preston* (*), and the decision of Lord Romilly in *Cooke v. Dealey* (*), appear at first sight to be antagonistic to this. In *Jermy v. Preston* the report does not state the trusts of the term subject to which the estate had been sold: but counsel on both [197] *sides appear to have said that the court had sold more than was necessary. How that could be is difficult to understand, for it appears from the report that the decree ordered a sale or mortgage, with the Master's approbation, of a sufficient part of the estates comprised in the term, and that the Master made a report approving of the sale, by which he must have found that a sufficient part was sold. Again, the judgment in *Cooke v. Dealey* (*) is based on a general principle assumed to have been laid down in *Ackroyd v. Smithson* (*), viz., that the conversion of real estate into personalty only takes effect to the extent of the object required, and that beyond this the rights of the parties remain the same as if no conversion had taken place. But all that *Ackroyd v. Smithson* decided was, that a conversion directed by a testator is a conversion only for the purposes of the will, and that all that is not wanted for these purposes must go to the person who would have been entitled but for the will. It does not decide that if the court or a trustee sell more than is necessary there is any equity to reconvert the surplus for the benefit of the heir-at-law of the person entitled at the time of the sale. As I have already remarked, it is not necessary to decide that question now: but it seems to me that if a conversion is rightfully made, whether by the court or a trustee, all the consequences of a conversion must follow: and that there is no equity in favor of the heir or any one else to take the property in any other form than that in which it is found: and that the sole question to be considered in all these cases is, whether the estate has been rightfully or wrongfully sold.

There will be a declaration that the fund is payable to the

(*) 1 B. C. C., 500.

(*) 13 Sim., 356.

(*) 22 Beav., 196.

(*) 1 B. C. C., 503.

legal personal representative of the infant; but the petitioner will have his costs out of the fund.

Solicitors: Mr. *Fortune*; Messrs. *Raven & Bradley*.

A testator directed his executors to sell and convey his farm to his son at an appraised value, and if the son did not choose to take it, he gave them authority to sell it to any one at their discretion; he ordered them to sell and convey any other real estate he might own at his death; and he gave the residue of his estate, after the payment of debts and legacies, to his six children, to be equally divided between them. The executors sold the farm to the son, and the debts and legacies having been paid, the proceeds of this sale remained to be divided as residue. All of the six children were alive at the death of the testator, but one of them died afterwards before the sale of the farm. Held that the share of the deceased child in the proceeds of the sale went to her administrator and not to her heirs: *Hammond v. Putnam*, 110 Mass., 232; *Stagg v. Jackson*, 1 N. Y. Rep., 206; *Bogert v. Hertell*, 4 Hill, 492; *Smith v. Gage*, 41 Barb., 60.

See *Matter of Vandervoort*, 5 N. Y. Leg. Obs., 25, 5 N. Y. Surr. Rep., 270; 1 Story's Eq. Jur., §§ 790-3; 3 Redfield on Wills (2d ed.), 140; Adams's Eq., 135, *et seq.*, marg. p.

And so if the guardian or trustee of an infant invest the infant's personal estate in lands, they will, nevertheless, pass to the personal representatives: 1 Williams on Executors (5th Am. ed.), 589; *Craig v. Leslie*, 3 Wheaton, 563; 2 Story's Eq. Jur., § 1357; Smith's Man. of Eq. (1st Am. ed.), 432.

Or it seems the husband of an infant wife: *Davis's Appeal*, 60 Penn. St. Rep., 118.

If a court of equity directs the personal estate of an infant to be invested in real estate, it will couple the order for such investment with a declaration that the land shall be considered during minority as constructively personal: Bispham's Eq., § 549; *Ashburton v. Ashburton*, 6 Vesey, 6; *Ex parte Phillips*, 19 Vesey, 123; Fonblanque's Eq., Laussat's ed., p. 88.

If the real estate of an infant be sold, the proceeds are to be deemed real estate until he arrives at majority, and

descend to his heirs as such: *Forman v. Marsh*, 11 N. Y. Rep., 544, reversing 7 Barb., 215; *Matter of Finch*, Clarke's Chy., 538; *Swezey v. Thayer*, 1 Duer, 286, 11 N. Y. Leg. Obs., 47; *Davison v. De Freest*, 3 Sandf. Chy., 456; *Shumway v. Cooper*, 16 Barb., 556; *Valentine v. Wetherill*, 31 Barb., 655; *Horton v. McCoy*, 47 N. Y., 21; *Craig v. Leslie*, 3 Wheaton, 563; 2 Story's Eq. Jur., § 1357; *March v. Berrier*, 6 Iredell's (N. C.) Eq., 524, approving *Scully v. Jernigan*, 2 Dev. & Batt. Eq., 144, and *Gillespie v. Foy*, 5 Iredell's Eq., 280; *Diller v. Young*, 2 Yeates, 261; 1 Sugden on Vendors (8th Am. ed), 292; *Dixon v. Dawson*, 2 Simons & Stuart, 327; Adams's Eq., 296, marg. p.; Bispham's Eq., § 549; Smith's Man. of Eq. (1st Am. ed.), 432.

So of an infant born after sale: *Bowman v. Tullman*, 27 How. Prac., 212, 2 Rob., 385, affirmed by Court of Appeals, June, 1869, 41 N. Y., 619.

And so of the real estate of a lunatic: *Lloyd v. Hart*, 2 Penn. St. Rep., 473; Adams's Eq., 296, marg. p.; *Ex parte Bromfield*, 1 Vesey, 453, and Mr. Sumner's note, p. 463; *Ex parte Phillips*, 19 Vesey, 123, and Mr. Sumner's note, p. 125.

But on an infant arriving at majority, and obtaining possession thereof, such proceeds are deemed to be personal property, and on his death thereafter descend to his personal representatives as such: *Forman v. Marsh*, 11 N. Y., 544, reversing 7 Barb., 215; *Matter of Finch*, Clarke's Chy., 538.

If an adult owner of land contract to sell and convey it, the purchase price goes to his personal representatives and not to his heirs, as the owner thus himself converts it into personalty: *Banker v. Scott*, 5 Maddock, 493; 1 Story's Eq. Jur., §§ 790-3; *Moore v. Burrows*, 34 Barb., 173; Adams's Eq., 296, marg. p.; *Green*, 34 Barb., 176; *Smith v. Gage*, 41 Barb., 60; *Schroepfel v. Hopper*, 40 Barb., 425; *Wright v. Holbrook*, 32 N. Y., 587, affirming 18 Abb. Prac. Rep., 202, 2 Robertson, 516; 1 Sugden on Vendors (8th Am. ed.), 292.

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And as to the heirs and personal representatives of the purchaser the lands pass to his heirs: 1 Story's Eq. Jur., §§ 790-3; *Moore v. Burrows*, 34 Barb., 173; *Adams v. Green*, 34 Barb., 176; *McKechnie v. Sterling*, 48 Barb., 330, 334; *Smith v. Gage*, 41 Barb., 60; 1 Sugden on Vend. (8th Am. ed.), 292.

The purchaser's personal representatives, and not his heirs, must pay for real estate contracted for, and the heir may compel the representative to pay therefor: *Lamport v. Beeman*, 34 Barb., 239; *Wright v. Holbrook*, 32 N. Y., 587, affirming 18 Abb. Prac. Rep., 202, 2 Robertson, 516; 1 Sug. on Vend. (8th Am. ed.), 292.

A tender of a deed to the personal representative of the purchaser instead of to his heir, is valid in a suit brought against him for the purchase price: *Brinckerhoff v. Olp*, 35 Barb. 27.

Although, perhaps, in order to discharge the seller from the contract it would be necessary to tender to the heirs as they might elect to pay, and proceed against the personal representative to compel him to pay the purchase price.

If by reason of the complication of the testator's affairs, the purchase money cannot be immediately paid, and the vendor rescinds the contract, yet on the coming in of the assets, the devisee of the estate contracted for, may compel the executor to lay out the purchase money in the purchase of other estates for his benefit: 1 Sugd. on Vend. (8th Am. ed.), 293; *Whittaker v. Whittaker*, 4 Brown's Chy., 31; *Vesey v. Monck*, 10 Ves., 597.

[Law Reports, 18 Equity Cases, 198.]

V.-C.M., March 11, 23, 1874.

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*THOMAS V HOWELL.

[1872 T. 71.]

Will—Construction—Pure and Impure Personality—Balance at Banker's—Set-off—Unpaid Rents—Charitable Bequests.

A testator having directed his debts and legacies (other than charitable legacies) to be paid out of impure personality, and his charitable legacies out of pure personality, the following points were decided:

The testator borrowed £8,500 from his bankers, to be repaid on a specified day. He died before the day of payment, and at his death a sum of £629 was standing to his credit, on his current drawing account:

Held, that the £629 must be treated as a set-off against the sum due on the loan account, and was not to be dealt with as an asset in the hands of the executors.

At the death of the testator a sum of £90 for rents collected, but not paid over, remained in the hands of his agent, and a larger sum was due to the agent for commission on rents collected:

Held, that the £90 must be set off against the larger sum due for commission, and was not to be treated as an asset of the testator.

There was also a sum of £861 due to the testator as arrears of rent from leaseholds, in respect of which ground-rent and other outgoings were payable:

Held, that the arrears of rent due were not liable to reduction for ground-rent and outgoings, but must be treated as pure personality.

There was a further sum of £2,202, due for the apportionment of the quarter's rent of leasehold estates:

Held, that this was pure personality.

The will contained a bequest of £200 to each of ten poor clergymen of the Church of England, to be selected by his friend, J. O.:

Held, that these were charitable legacies, but were payable out of the testator's general estate.

Gift by will of legacies of £200 each to twenty charitable institutions, followed

by a gift by a codicil as follows: "Presuming and believing that the rental of my estate will produce from £16,000 to £18,000, I desire the four executors named at the top of my will will appropriate £4,000 more to the established institutions of the country, making it together £8,000:

Held, that the gift was conditional on the income of the estate amounting to the specified sum, and that not being the case the gift failed.

Attorney-General v. Lloyd (1) not followed.

THIS was a suit for the administration of the estate of Thomas Howell, under which a decree was made in June, 1872, and the *case now came on upon further consider- [199
ation for the determination of various questions arising under Thomas Howell's will, which was dated the 21st of April, 1870.

The testator by his will appointed four persons executors, and, after giving many pecuniary legacies, to which it is unnecessary to refer, continued as follows:

"I give to the treasurer for the time being of St. Mark's Hospital, City Road, the sum of £200 for the general use and benefit of the said hospital.

"And to the treasurer of the Royal Literary Society of London, for the use and benefit of such society, £50, and the receipts of the persons who shall be respectively treasurers of the said hospital and society at the time when the said legacies respectively shall be paid shall be a good discharge to my executors and trustees or trustee for the same.

"I also give to each of twenty charitable institutions, one of which shall be the Royal National Life Boat Institution, and the other nineteen institutions shall be such as my said trustees or trustee shall select, the sum of £200, and I declare that the receipt of the treasurer for the time being of each such institution shall be a good discharge for the legacy payable to or for the benefit of such institution.

"And I give to each of ten poor clergymen of the Church of England, whether holding benefices or not, to be selected by my friend Joseph Butterworth Owen, if alive, or, if dead, then by the acting executors or executor of my will, and in his or their judgment not holding High Church or Puseyite doctrines—£200."

Other charitable legacies were also given, and the will contained the following direction: "I direct that all expenses and money necessary to be paid by my executors, or my trustees or trustee, and any legacies other than legacies to charities or for charitable purposes, shall be paid out of such part of my said estate as cannot legally be applied to charitable purposes, and that my legacies to charitable institutions, or for charitable purposes, shall be paid only out

(1) 1 Ves. Sen., 32.

of such part of my estate as shall be legally applicable for such purposes."

The testator made a codicil to his will, dated the 29th of 200] *September, 1871, to which it is unnecessary to refer, and also a further codicil, dated the 18th of October, 1871, which began as follows :

"Codicil to my will, made October 18th, 1871. Presuming and believing that the rental of my estate will produce from £16,000 to £18,000, I desire the four executors named at the top of my will will appropriate £4,000 more to the established institutions of the country, making it together £8,000."

The testator died on the 28th of February, 1872. The only real estate of the testator at the time of his decease consisted of two freehold cottages specifically devised by his will; but he was entitled to personal estate of very large amount, which was sworn under £140,000. The income of his whole estate, however, fell short of the sum of £16,000 referred to in his second codicil. By far the larger portion of his personal estate consisted of leasehold property, and it depended upon the construction of the above-mentioned clauses of the will and codicil whether the amount of his pure personal estate was sufficient to pay the charitable legacies in full.

Under these circumstances it became necessary to ascertain what portion of his estate came under the definition of pure personalty legally applicable to charitable legacies, and what portion of his legacies came under the legal definition of charitable legacies, and various questions were submitted to the court by the certificate.

It appeared that on the 20th of December, 1871, a sum of £8,000 was placed by the London and Westminster Bank to the credit of the testator's account by way of loan, such loan to be repaid by the testator on or before the 14th of March, 1872. This sum of £8,000 was afterwards reduced by the testator, during his life, to £6,500, which still remained due at his death on the 28th of February, 1872. At that period there was a sum of £629 12s. 2d. standing in the books of the said bank to the credit of the testator's current drawing account.

It was submitted to the judgment of the court whether or not the said sum of £629 12s. 2d. was, under the circumstances, an asset come to the hands of the executors, or must 201] be taken to *be and treated as a set-off by the bank in reduction of the £6,500 due to them on the loan account.

Mr. *Glasse*, Q.C., and Mr. *North*, for the plaintiffs, the trustees, stated the facts of the case.

Mr. *Cotton*, Q.C., and Mr. *Davey*, for some of the residuary legatees: We are interested in reducing the amount of pure personalty, and we contend that the sum due to the bankers was one specific sum of £6,500, less £629 12s. 2d., which, as a matter of course, would be set off against the larger sum due to the bankers. The drawing account would cease to be a separate account upon the testator's death, and it was only a matter of arrangement between the bankers and the testator that he continued drawing upon one account and allowed the other to remain till it was convenient to him to pay it off. The £629 12s. 2d. cannot, therefore, be considered as an asset of pure personalty; but the £6,500, less the sum of £629 12s. 2d., is all that the executors will have to pay out of impure personalty.

Mr. *J. Pearson*, Q.C., and Mr. *J. G. Wood*, for some of the charity legatees: Our contention is, that there could be no set-off by the bankers of this sum of £629 12s. 2d., which was standing to the separate drawing account of the testator at his death. The £6,500 was a loan by the bankers, to be repaid on a particular day. The money was not due till the 14th of March, 1872, consequently at the death of the testator, on the 28th of February, he was actually entitled to draw out the whole of the £629 12s. 2d. If the executors had proved and gone to the bank the day after the testator died, the bankers would have been bound to pay them that amount, and they could not set it off against what was not then due, and if an action had been brought by the executors against the bankers for the £629 12s. 2d., the bankers could not have escaped payment by pleading a set-off of another sum which they had agreed not to demand until a subsequent period.

Although for convenience the executors might a fortnight afterwards have set-off the £629 12s. 2d. against the [202 £6,500 and paid the bankers the difference, still it does not diminish the amount of assets which the executors were entitled to receive, and the cash at the bankers constituted the assets which formed part of the pure personalty of the testator made applicable by his will to the payment of his charitable donations.

Mr. *Vaughan Hawkins*, for other charity legatees.

Mr. *Robinson*, for one of the charities.

SIR R. MALINS, V.C.: The facts are simple: the testator, Mr. Howell, was a very wealthy man, but he happened, I suppose, to require a sum of money for a particular purpose,

and he borrowed £8,000 from his bankers, to be repaid on the 14th of March, 1872. That amount was placed to the credit of his loan account. He afterwards directed certain specific sums to be put to his loan account, and thereby reduced the amount of the loan to £6,500; that sum then was due on the 14th of March, and he died on the 28th of February. I agree that when a banker makes an advance to a customer for a particular period he is bound to honor checks upon the general drawing account of his customer to the last farthing of the amount standing to his credit, and consequently that as between Mr. Howell and his banker, Mr. Howell was entitled to draw out the whole of that £629, which belonged to his drawing account; but the question is, what did he owe to the banker at the time of his death? Under his will the debts and expenses are directed to be paid out of such part of his estate as could not legally be applied to charitable purposes, that is to say, out of his impure personalty, and the legacies to charitable institutions, or for charitable purposes, out of pure personalty. It is said, therefore, that when the executors went to pay the bankers the debt due to them they were bound to pay the £6,500 in full, leaving the £629 12s. 2d. to be paid out to them by the bankers as an asset of the testator; but, in fact, if they had gone to the bankers and asked them what was owing to them, the bankers would have said, Mr. Howell owes us £6,500, 203] and we owe Mr. *Howell £629 12s. 2d., and they would naturally have deducted one sum from the other, and would have handed over to the bankers the difference. I cannot come to any other conclusion but that the executors were bound to pay the debt after deducting one sum from the other, therefore the difference only should be paid out of impure personalty. The £629 12s. 2d. would not be an asset at all, and would not form part of the pure personalty.

At the death of the testator a sum of £90 17s. 1d. remained in the hands of his agent on account of rents collected for the testator, but not paid over. At the same time there was a much larger sum due to the agent for commission on rents collected by him. A question was raised whether or not this sum of £90 17s. 1d. was to be deemed an asset or must be treated as a set-off by the agent in part satisfaction of the larger sum due to him on account of unpaid commission on rents collected for the testator in his lifetime.

Mr. *Glasse*, Q.C., and Mr. *North*, submitted this question to the judgment of the court, and cited *Edwards v. Hull* (').

(') 6 D. M. & G., 74.

The VICE-CHANCELLOR decided that this sum of £90 17s. 1d. must be set off against the larger sum due to the agent for commission, and, consequently, that it did not form part of the pure personal estate of the testator.

At the testator's death there was a sum of £861 19s. due to him as arrears of rent.

A question was raised whether this sum should contribute a proportion of the ground-rent and other outgoings in respect of the property from which the same arose.

The VICE-CHANCELLOR said the £861 19s. was in the nature of fruit fallen, and was part of the pure personal estate. The debts due for rent could not be subject to contribute to the payment of ground-rent and other outgoings.

*There was also a sum of £2,202 17s. 6d., being the [204 apportioned amount of the quarter's rent of the testator's leasehold estates due at Lady Day, 1872, up to the 28th day of February, 1872, the day of the testator's death.

The question submitted to the court was whether the sum so apportioned was to be considered as pure personalty, or whether it was an asset connected with land.

The VICE-CHANCELLOR was of opinion that the apportioned amount of the quarter's rent due up to the testator's death was pure personalty.

The next question raised was whether the legacies of £200 each to the ten poor clergymen were charitable, and therefore liable to abate, or were personal, and consequently payable in full.

Mr. *Glasse*, Q.C., and Mr. *North*, for the plaintiff: We say that these gifts to ten poor clergymen are in the nature of charitable legacies, and therefore only payable out of pure personalty; and that if the portion of the estate applicable to such purposes will not pay the charitable legacies in full, these gifts must abate with the rest.

This is a similar case to that of *Nash v. Morley* (¹), where "the gift was to be divided among poor pious persons, male or female, old or infirm, as the executors see fit, not omitting large and sick families of good character." That was held to be a valid charitable bequest, the word "poor" extending through the whole sentence. We say the motive of the gift is poverty. In *Attorney-General v. Baxter* (²), and, on appeal, *Attorney-General v. Hughes* (³), it was decided that a devise of moneys to be distributed amongst pious ejected Nonconformist ministers was a good charitable bequest, and the money was ordered to be paid out to Baxter, to be distributed according to the will.

(¹) 5 Beav., 177.

(²) 1 Vern., 248.

(³) 2 Vern., 105.

Mr. *Cotton*, Q.C., and Mr. *Davey*, in the same interest, for residuary legatees: Relief of poverty is charitable, and this 205] is consequently a *charitable bequest. It was so held in *Russell v. Kellett* ⁽¹⁾. In that case there were several gifts of the same nature as this, such as "To poor widows or creditable industrious unmarried women upwards of forty years of age;" again, "to poor creditable industrious persons in a particular town with two children or upwards, or above fifty years of age, maimed or otherwise, unable to gain a living;" and lastly, "to the poor of Ulverstone £50, to be paid among them as the trustees shall think proper." All these were charitable gifts. *Attorney-General v. Price* ⁽²⁾, and *Isaac v. Defriez* ⁽³⁾, were cases of a similar kind.

Mr. *Higgins*, Q.C., and Mr. *E. A. Owen*, for the representatives of a deceased residuary legatee: Whether this is looked at on principle, or in view of the Statute of Elizabeth (43 Eliz. c. 4), or on authority, this is a charitable bequest. The cases collected in *Tudor's Leading Cases* ⁽⁴⁾ all go to this.

Mr. *V. Hawkins*, for some of the charitable legatees: Our argument is that the question whether this is a charitable bequest or not arises in a distinct way from the cases cited.

There is no case in which the question now raised has been decided, except the case of *Brunsdon v. Woolredge* ⁽⁵⁾, where there was a gift of personalty savoring of realty which was ordered to be distributed among the poor relations of the testator's mother, which was construed to mean relations who were poor and objects of charity, showing that the gift was not a charitable bequest within the Statute of Mortmain. The statute (9 Geo. 2, c. 36) was passed in 1736, and the decree was made in 1766. The date of the will does not appear from the report.

There are, however, two questions—whether a gift is charitable, so as to be exempt from the rule against perpetuities, and another whether it is within the Statute of Mortmain. That a gift to poor relations is not within the statute, is decided by *Brunsdon v. Woolredge*.

206] *Suppose you have a gift of this sort—a testator giving directions to distribute money from time to time, or forever, among poor persons of a particular sort—there the court will look to see whether it is to have a perpetual continuance; if it is, then the gift is void, but if it is only to distribute a sum immediately, it is not a charity at all; it is a mode of ascertaining who are the individuals who are to

⁽¹⁾ 3 Sm. & Giff., 264.

⁽²⁾ 17 Ves., 371.

⁽³⁾ 17 Ves., 373, n.

⁽⁴⁾ 2d Ed., p. 49.

⁽⁵⁾ Ambl., p. 507.

receive the gift. These gifts to poor persons are only as a distinguishing mark to find the persons. *Brunsdon v. Woolledge* ⁽¹⁾ was a case of that nature. The case of *Attorney-General v. Price* ⁽²⁾ is in our favor, for there it was a perpetual charity, and in *Gillam v. Taylor* ⁽³⁾ the point was that the charity was to have perpetual existence. It was so also in *Nash v. Morley* ⁽⁴⁾ and in *White v. White* ⁽⁵⁾.

Mr. *Robinson*, in the same interest, cited *Liley v. Hey* ⁽⁶⁾, where it was held that a devise in trust to distribute the rents and profits annually amongst certain families according to their circumstances as in the opinion of the trustees most needed assistance, was not void, as tending to create a perpetuity, and not void within the Statute of Mortmain.

Mr. *Holland*, for two of the clergymen who had been selected: This is a precisely similar case to that of *Attorney-General v. Baxter* ⁽⁷⁾. In fact, that case is much stronger than this; there it was held to be a charity in the court below, but the decree was discharged on appeal, as reported ⁽⁸⁾; and in *Moggridge v. Thackwell* ⁽⁹⁾, we see from Lord Hardwicke's notes why it was discharged. He says, referring to *Attorney-General v. Baxter*, "It was not upon anything contradicting the general principle, but because it was a legacy to sixty particular ejected ministers to be named by Baxter, and as if a legacy to those sixty individuals."

There is no case deciding simply that a gift to a number of poor persons, to be selected by a particular individual, is a charity. It ^{*}is the same as if he had selected and [207 named the ten persons himself.

Mr. *Hemming*, for the Attorney-General.

Mr. *Alexander*, for one of the poor clergymen.

Mr. *Cotton*, in reply: Where a legacy is given to persons not known to the testator, but distributable on account of their poverty, that is a charitable gift.

The effect of the word "poor" is to cut the bequest down to a charity. A gift to the school for the sons of poor clergy would be a charity. Wherever the gift is for the benefit of the poor, it is a charity. That is the effect of the decision in *Russell v. Kellett* ⁽¹⁰⁾, and also in *Mahon v. Savage* ⁽¹¹⁾, and *Thompson v. Corby* ⁽¹²⁾.

A charitable gift is not the less charitable because the payment is to be immediate. Whether it is charitable or

⁽¹⁾ Amb., 507.

⁽²⁾ 17 Ves., 371.

⁽³⁾ Law Rep., 16 Eq., 581.

⁽⁴⁾ 5 Beav., 177.

⁽⁵⁾ 7 Ves., 423.

⁽⁶⁾ 1 Hare, 580.

⁽⁷⁾ 1 Vern., 248.

⁽⁸⁾ 2 Ibid., 105.

⁽⁹⁾ 7 Ves., 96.

⁽¹⁰⁾ 3 Sm. & Giff., 264.

⁽¹¹⁾ 1 Sch. & Lef., 111.

⁽¹²⁾ 27 Beav., 649.

not depends upon the objects, and not at all on weather, if not charitable, it would be a perpetuity. If the objects are so far charitable as to oust any objection on the ground of perpetuity if the gift had been perpetual, they must equally be charitable within the meaning of the act of Geo. 2. The cases cited show that a gift to such objects is charitable for the former purpose, and it must, therefore, for all purposes be regarded as charitable.

SIR R. MALINS, V.C.: The only question is, whether this legacy is a charity which would come within the meaning of the act of 9 Geo. 2, c. 36. It appears that there is abundance of property to pay all the legacies, but the pure personalty is not sufficient to pay the charitable legacies. If therefore the case comes within that statute, then these legacies must be paid out of that portion of the estate which is pure personalty, and the charity legacies will have to abate.

Now is this legacy within the meaning of that statute? The testator gives "to each of ten poor clergymen of the 208] Church of *England, whether holding benefices or not, to be selected by my friend Joseph Butterworth Owen, if alive, or if dead, then by the acting executors or executor of my will, and in his or their judgment not holding High Church or Puseyite doctrines, £200." In other words, it is the gift to ten clergymen, because they being poor require it. There is no doubt that his object was to confer a benefit on those that required it, and they were to be selected by Mr. Owen. In one meaning of the word, that is certainly a charity, and so in a certain sense wherever a legacy is given it is a charity; but it would be carrying the doctrine of the court a long way to say, that because a legatee is to have a gift on account of his being a poor man, that therefore it is a charitable bequest within the meaning of the Mortmain Act. It would be a monstrous injustice to hold this when the very object of requiring assistance is the fact of a man being poor. In every case it depends on whether there is a charity, which is to continue for a certain specified time, as in the case of *Nash v. Morley* ⁽¹⁾, where you have not only old and infirm individuals and people with large and sick families, but they are to sustain a particular character at a particular time. Here I am asked to treat the bequest as if poverty were the principal ground of the gift. Nothing is more opposed to the meaning, in my opinion. It is said that because the legacies are given to them as poor men, that therefore they cannot have it unless there is enough of pure personalty to satisfy the charitable legacies. Suppose the

(1) 5 Beav., 177.

testator had said, "I give to A., B., and C., who are poor clergymen," that would not be a charitable legacy, but in giving to ten poor clergymen, who are quite as good, and of the same class of clergymen as those who are not poor, it is said that is a charity. It appears to me to be just the same as if they had been named, and I do not see on principle that it makes any difference, or why they should not have it, because they happen to be poor.

This is my opinion on principle; but how does it stand on authority? There are several cases in favor of my view of this question. There is *Attorney-General v. Baxter* (¹), reported on appeal as *Attorney-General v. Hughes* (²), where there was a devise of moneys to be distributed among poor ejected nonconformist *ministers; it was there ordered [209 to be paid out to Baxter, to be by him distributed according to the will, thus reversing the decision of the court below. The motive was, no doubt, charity, but it was held not to be a charitable gift. It has been contended in this case that because the motive is charity, therefore it is a charitable gift within the statute; but I dissent from that argument. It is not a charitable bequest, unless it is a gift for the maintenance of a charity. It has been suggested that in *Brunsdon v. Woolredge* (³), the will was made before the Statute of Mortmain, but it seems that the decree was made in 1765, and the statute was passed in 1736. There the bequest was to his mother's poor relations, and that was construed to mean "relations who are poor and objects of charity," and the money was ordered to be distributed among such of the poor relations of the mother as Woolredge should think fit. If the gift among poor relations had made it a charity within the Mortmain Act, it would have been altogether void. The Master of the Rolls there says, "At first I thought the estates called Ryders and Franklins had been given to be a continuing perpetual fund for the poor relations forever, as was the case of a particular fund in *Isaac v. Defriez* (⁴), but I am satisfied those estates as well as the rest are to be sold."

I can find no case which has ever been decided in opposition to this view, and therefore, on principle as well as upon authority, I decide that these are general legacies and must be paid out of the general estate of the testator.

March 23. A question was now raised as to the meaning and effect of the second codicil.

Mr. J. Pearson, Q.C., and Mr. Wood, for one of the nineteen institutions which had been selected by the executors

(¹) 1 Vern., 248.

(²) Amb., 507.

(³) 2 Vern., 105.

(⁴) 17 Ves., 373, n.

as recipients of the legacies of £200 given by the will: The introductory statement in the codicil does not import a condition. It is a mere statement of fact of the testator's belief as to the extent of his estate, and the fact of the statement being erroneous does not make the gift invalid. In order to [210] make the *gift conditional there must be some words importing that if the calculations are incorrect the gift is to fail: *In the Goods of Dobson* (*); *In the Goods of Martin* (*).

The distinction is between a statement of a fact which turns out to be untrue, as a ground for giving or revoking a legacy, as in *Campbell v. French* (*), and a mere statement of believing or having been advised as to a fact, and the belief or advice turning out to be erroneous, as in *Attorney-General v. Lloyd* (*); *Jarman on Wills* (*).

Mr. *Robinson*, for other charities: The distinction between the statement of a fact and of belief or advice as to a fact, is too well decided to be disturbed: *Gordon v. Gordon* (*).

Mr. *A. C. Humphreys*, for another charity.

Mr. *Hemming*, for the Attorney-General: The pure personalty being insufficient for payment in full of the charitable legacies given by the will, the question is only one as between one charity and another. But the point is of importance as involving a principle which may be applicable in other cases, and the rule which has been laid down in *Attorney-General v. Lloyd* ought to be maintained.

Mr. *Bovill*, Q.C., appeared for a legatee under the second codicil.

SIR R. MALINS, V.C., without calling upon any other parties: I entertain a clear opinion as to the proper construction of this codicil. The testator has given by his will a number of legacies, and amongst them a fund to be divided between the Royal National Life Boat Institution and nineteen other charities to be selected by his executors, and he gives a general direction for marshalling his estate between the charitable [211] and personal *legacies, and then having given as much to charities as he thought his estate would stand, he proceeds to divide the residue.

Subsequently contemplating his estate as being of a certain amount, and thinking that in that view he ought to increase the amount of his charitable legacies, he gives an additional sum of £4,000 "to the established institutions of the country," by which expression he meant those institutions to which he had before referred.

(1) Law Rep., 1 P. & D., 88.

(2) Ibid., 380.

(3) 3 Ves., 321.

(4) 1 Ves. Sen., 32.

(5) 3d Ed., p. 170.

(6) 1 Mer., 141.

Why does he give the £4,000 more? Because, as he says, he believes the rental of his estate will produce £16,000 to £18,000 a year. It is argued that even if the estate is less than that amount, the legacy ought still to be given, and that the question is concluded by authority. In my opinion, the present case is not within any of those which have been cited; because in the cases cited the erroneous belief or advice was as to the existence or capacity of the legatee. But it is quite a different thing where the erroneous belief is as to the extent of the testator's property. If a testator said he thought he had £100,000, and distributed his estate accordingly, and it turned out that he only had £20,000, his intention would clearly be defeated by disregarding the preliminary statement.

The rule is to find out what the testator means, and give effect to his intention. Now what does the testator mean here? When he says that, presuming and believing a certain state of things, he gives an additional sum of £4,000, on what principle can I say that his belief did not influence him in making this gift, and how can I double the legacies, when in fact the supposed state of things was an entire mistake?

It is said that the question is concluded by authority. But in my opinion not one of the cases cited touches the present case, though the case of *Campbell v. French* (*) is somewhat analogous. The testator there by a codicil revoked some legacies, giving his opinion that the legatees were all dead, and the fact turned out the other way, and it was held that the revocation did not take effect.

With regard to *Attorney-General v. Lloyd* (*), it was a very peculiar case, and I am of opinion that if the question had turned *on the construction of the first codicil, [212 the decision would have been the other way. It is perfectly clear that the reason on which the gift was made having failed, the conditional gift would not be good. Then came the second codicil, by which the testator made an absolute gift of the realty to one person, and an absolute gift of the personalty to the charity to which he had previously given the whole, stating as a reason for the alteration in disposition, his having been advised that a gift of the realty would have been void under the Statute of Mortmain. This was a mistake, because the will was made before the act of 9 Geo. 2, but the codicil was upheld. That does not reach this case, because here there is no complete alternative gift.

I think, however, that if *Attorney-General v. Lloyd* (*)

(*) 3 Ves., 321.

(*) 1 Ves. Sen., 32.

had to be decided now, the decision would be the other way.

The result is that the additional gift of the £4,000 fails altogether.

Solicitors: Messrs. *Bower & Cotton*; Messrs. *Merriman & Pike*; Messrs. *Owry, Farrer & Co.*; Messrs. *Raven & Bradley*; Messrs. *Cookson, Wainwright & Pennington*; Messrs. *Whitaker & Woolbert*; Mr. *H. T. Boodle*; Messrs. *Norris, Allens & Carter*.

[Law Reports, 18 Equity Cases, 215.]

V.-C.B., April 25, 26, 29; Nov. 21, 22, 24, 25; Dec. 10, 1873.

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*HEATH V. CREALOCK.

[1870 H. 248.]

Trustee and Cestui que Trust—Breach of Trust—Mortgage—Priority—Estoppel—Purchase for Value without Notice—Delivery up of Title Deeds—Secondary Evidence.

In 1856, A. and B., being trustees of £7,000, invested it on mortgage of freeholds, of which C. was owner. The mortgage was negotiated by B., who was a solicitor, and had for some time been engaged in various transactions with C. and acted for him professionally. The business arrangements of the trust, including payment of the income to the *cestui que trust*, were carried on by B., no active part being taken by A., who was a clergyman, and frequently absent abroad for his health. In 1859, C., with the knowledge and authorization of B., but without the knowledge of A., sold a portion of the mortgaged property to D. Upon this sale all notice of the mortgage was suppressed. The title deeds were handed to D., and the purchase-money, £3,000, was received by B., who gave C. a receipt "for self and co-trustee," promising to obtain A.'s execution of a reconveyance on his return to England. In 1870 C. contracted to sell a further portion of the property to E., and in the course of the transaction, on pressing for a reconveyance, was informed by B., that he had misappropriated the £3,000. Upon the representation that C. had succeeded in selling portions of the mortgaged properties for £4,500, A., who was wholly ignorant of the real state of the case, was induced by B. to execute—1, a conveyance by direction of C. to E., as purchaser for £1,500; and, 2, a reconveyance to C., in consideration of an alleged payment of £3,000, of the portions already sold to D. (to enable C., as it appeared, to convey this portion separately to a purchaser).

Upon receiving the reconveyance, C. executed the conveyance and completed the sale to E., and the purchase-money (£1,500) was handed over to B., who shortly afterwards absconded with the mortgage deed in his possession:

I. *Held*, (a), that A. was entitled to have the reconveyance of 1870 cancelled as obtained by fraud; and, (b), that the estate supposed to have been acquired by C. under such reconveyance having been destroyed, there had been no subsequent acquisition of title by C. so as to perfect against A., by estoppel, the defective title which D. acquired under his purchase from C. in 1859.

II. *Held*, also (following *Colyer v. Finch* ⁽¹⁾); that the relief sought against D. being to compel him to redeem A.'s prior mortgage, or in default to stand foreclosed, the doctrine that the court will not interfere as against purchasers for value without notice, did not apply; and that upon the failure of D. to *redeem, A. was entitled

(1) 5 H. L. C., 905.

to realize his security (except as to the part sold to E. against whom the bill was dismissed) by a sale, and to have the title deeds in the possession of D. delivered up.

Secondary evidence of the mortgage deed of 1856 under the circumstances admitted.

IN March, 1856, the plaintiff, the Rev. Charles Harbord Heath, and the defendant, William Swain Crealock, were appointed the trustees of certain funds, which they held subject to the trusts of a deed dated the 24th of February, 1816. Of these funds £2,096 11s. 9d. had been divided amongst the persons beneficially interested, and £7,700 was advanced to the defendant Stephens upon the security of a mortgage in fee simple, dated the 24th of November, 1856, of property in Wales, of which Stephens was the owner; the mortgage being accompanied by a delivery of the title deeds to plaintiff and Crealock as mortgagees. The defendant Crealock was at that time in practice as a solicitor at Aberystwith, of good repute, and in considerable practice, and being solicitor in the affairs of the trust, as well as one of the two trustees, he undertook the negotiation of the mortgage, the examination of the title, and the preparation of the security.

The defendant Stephens had also been in practice as a solicitor, and before the date of the mortgage there had been between himself and Crealock various pecuniary and other transactions which were afterwards continued. In respect of these dealings an account current was established between them; various sums of money having been received by Crealock on account of Stephens, and payments made to and on his behalf, and the mortgage money, £7,700, was carried into this account, and formed an item to the credit of Stephens. Crealock was also employed by Stephens professionally, and during the period over which the account extended he also acted as his banker.

The amounts which from time to time became due in respect of the interest on the mortgage debt were carried in the account to the debit of Stephens, and were paid by Crealock on Stephens' behalf to Major Bowen, who was entitled as tenant for life to that interest. Early in 1859, Stephens, intending, as he stated, to pay off the mortgage debt, advertised the mortgaged hereditaments, with other property belonging to him, for sale. This intended public sale *was abortive; but Stephens subsequently (in Feb- [217 ruary, 1859) sold by private contract three several portions of the property comprised in the mortgage to the defendants, Lewis, Beavan, and Pugh, for sums amounting in the aggregate to £3,080.

When the time for completing the sales approached, Crea-

lock, who acted as solicitor for Stephens in the matter, informed him that as the plaintiff was somewhere abroad great delay would be occasioned by getting him to join in the conveyances to the purchasers, or in a reconveyance to Stephens. Accordingly Stephens, as he stated, believing these statements to be true, and it being important to avoid any delay, agreed with Crealock that the sales should be completed without disclosing the existence of the mortgage, and that he (Stephens) should execute simple conveyances to the purchasers as if he were entitled in fee simple free from incumbrances, and that he would not take a reconveyance from the plaintiff and Crealock until the whole of the mortgage debt was paid off. The usual inquiries were made on behalf of the purchasers as to the existence of any incumbrances affecting the property contracted to be sold, and the reply returned by Crealock as solicitor, and on behalf of Stephens, was, "Not that I am aware of."

The title deeds, which had remained in the possession of Crealock, as solicitor to the trustees, were by him given up to Stephens, who was thereby enabled to deduce an ostensibly good title, free from incumbrances, to the several portions so sold; and upon the completion Stephens delivered such title deeds to the purchasers, in whose possession they still were.

The purchase-money, £3,080, was paid to Crealock, who gave Stephens a receipt in the following form:

"London, 23d February, 1859.

"Received of T. K. Stephens the sum of £3,080, on account of and in part discharge of the principal-money of £7,700, due to us on mortgage of Mr. Stephens' estate, and we undertake on payment of the balance to release and reconvey the parts thereof called (naming them), when required by Mr. Stephens, his heirs, executors, administrators and assigns, free from all mesne incumbrances.

"For self and co-trustee.

"Wm. Swain Crealock."

218] *Stephens, after the 23d of February, 1859, paid Crealock interest on the balance only of the mortgage debt (£4,620) until 1870, while Crealock, who had received and appropriated to his own purposes the £3,080, continued to pay Major Bowen (the *cestui que trust*) the full amount of interest on the £7,700. Under these circumstances the plaintiff, who was for a considerable period absent abroad, had no knowledge whatever, or suspicion, of what had taken place, and until the absconding of Crealock in September, 1870, had neither knowledge nor notice of any circumstance

leading him to believe or suspect that the mortgage security had been in any degree imperilled or affected.

Stephens, as he stated by his answer, continued to pay interest upon the £4,620, without the slightest thought or suspicion that the plaintiff had not been informed that £3,080 of the mortgage debt had been paid off, or that the money had not been reinvested by Crealock in the joint names of plaintiff and himself.

In November, 1864, Stephens, in writing to ask Crealock whether he and his co-trustee would have any objection "to take up the principal and interest to the next half-yearly day of payment" (24th of May, 1865), for the first time made inquiry if the amount paid off had been indorsed upon the mortgage deed. Crealock wrote back that speaking from memory he believed the memorandum referred to by Stephens was at the time indorsed on the mortgage deed, and that unless Stephens had any very particular object in their receiving the money next May, neither Major Bowen nor Heath would wish the security to be changed if it could be helped.

In 1865 a small portion of the property comprised in the mortgage, was taken by the Central Wales Railway Company, for which they agreed to give £10 compensation. On this occasion Stephens suggested in a letter to Crealock the propriety of preparing a reconveyance of the property on which the mortgage money had been paid off and sending it to plaintiff for execution. Crealock took no notice of the suggestion, and the matter was allowed to drop. The matter was again referred to by Stephens in the summer of 1867, and Crealock promised to obtain the reconveyance when plaintiff came back to England; but, according to Stephens' statement, not receiving any intimation of the return of the plaintiff to England, *and not thinking that there was [219 any danger or impropriety in not obtaining the reconveyance, "I (Stephens) did not prepare the draft of it, but allowed the subject again to drop."

In December, 1869, Stephens agreed to sell to William Price for £1,500 another portion of the property comprised in the mortgage. Though, as he admitted in his answer, he would have been glad if the facts of the mortgage to plaintiff and Crealock could have been still suppressed, as it had been on the occasion of the purchases in 1858-9, he was afraid that he might incur some risk under 22 & 23 Vict. c. 35, s. 24, and 23 & 24 Vict. c. 38, s. 8 (providing that any vendor or mortgagor concealing from the purchaser or mortgagee any settlement, deed, will, or instrument material to

the title, or any incumbrance, should be deemed guilty of a misdemeanor, and punishable accordingly), if he again suppressed the fact of the mortgage; and accordingly he wrote to Crealock pressing him to obtain the execution of a reconveyance by Heath, and the signature of a receipt acknowledging the receipt not only of the £1,500, the price of the portion contracted to be sold to Price, but of £3,080 previously paid by Stephens.

On the 4th of March, Crealock wrote: "You will remember when you wished to sell the former farms that I explained to you that I should have to reinvest the money until such time as you would be paying off the balance of the mortgage, as I could not arrange to sever the amount. I have on the present occasion had great difficulty in getting the parties' consent to receive this £1,500 now on account without the residue, and, indeed, it is only on the understanding that the balance of the mortgage shall be all paid up by the 1st of next August that they agree to reconvey this portion now; I have, therefore, to carry out this understanding so far, called in £3,080 received from you and reinvested by me, and this will be ready to be paid over to the parties interested by the middle of July, at which time those farms which were sold for the amount had better be reconveyed by myself and Heath to you, and in the meantime it will be necessary for you to make arrangements for getting the balance together, either by transfer or new mortgage, or a sale of portion of the remaining property. There will be £3,120 to make up, and I should think you might easily be able to sell the two Radnorshire farms for sufficient to cover 220] that *amount. I have pushed this off as long as I possibly could, but during the last few weeks I have had great difficulty in getting the *cestuis que trust* to listen to any further delay in having the mortgage realized. I have told them that you have, to comply with their wishes, contracted for the sale of other properties comprised in the security, at the values stated in the valuation thereof, amounting to £3,080, which will be certainly paid to them before the 1st of next August, and that you will use every endeavor to provide the balance in the meantime, if they will let the matter stand over until then. It won't do, therefore, for me now to send the form of receipt you propose for Heath's signature, and for same reason it was I varied the form of recital in the conveyance. At present nothing appears in this transaction to show that the mortgage to us does include the farms previously sold, as these did not appear in the abstract to Bird's farm; and if it should not be called for before

completion, nothing would have been mentioned on the subject. I will make out and send you my charges in the matter as desired. You will of course arrange for the sum of £1,500 being paid over to us clear, as that is the sum I have named to the *cestuis que trust*." And again, on the 2d of August, 1870, Crealock wrote to Stephens: "The *cestuis que trust* have not, as yet, received either the £3,080 or the £1,500—and if you carry out your present intention of not sending me the conveyance to get executed to you, I don't see how they are likely to get either of them.

About the time when the tenant for life died (1866), on the plaintiff's refusing any further extension of time, Crealock had represented to him that Stephens was desirous of selling the properties comprised in the mortgage security, and of doing so to advantage, by putting up the property from time to time for sale in portions; and in this year (1870) Crealock represented to the plaintiff that Stephens had succeeded in selling a part of the mortgaged property for £3,080, and another part for £1,500, and that he was desirous of having reconveyed to himself the several portions so sold upon payment of the several sums in part discharge of the mortgage debt. Two deeds were accordingly prepared for the purpose of effecting this object, and were sent by the plaintiff's then solicitors, Messrs. Budd & Son, to the plaintiff *for execution by him, one being a conveyance by [221] the direction of Stephens to a purchaser (Price) for £1,500; the other being a reconveyance to Stephens in consideration of £3,080 alleged to be paid by him in respect of several small properties comprised in the mortgage deed, to enable him, as it appeared, to convey them separately to a purchaser or purchasers. The plaintiff executed these deeds and sent them to Crealock on or before the 22d of August, 1870. Messrs. Budd, plaintiff's solicitors, on the 23d of August, 1870, wrote to Crealock suggesting that the moneys, the consideration for these reconveyances, should be paid into a joint account, in the names of plaintiff and Crealock, until they could be distributed among the *cestuis que trust* interested in them. The money not having been paid as had been expected, the plaintiff's solicitors pressed Crealock to complete the matter, and threatened a journey to Aberystwith, to attend on behalf of the plaintiff the completion of the sales, and see to the appropriation of the money. Crealock continued to make various excuses for the delay, and expressed his willingness that the purchase-moneys, as soon as received, should be paid into a deposit account in the names of plaintiff and himself, until the distribution was

effected, or that Messrs. Budd should attend the completion of the purchases. In the meantime Stephens, having been informed by Crealock that the plaintiff had executed the conveyance and reconveyance, wished, according to his answer, "to satisfy myself by other evidence than Crealock's statement that the plaintiff's signatures to those deeds were genuine," and on the 27th of August sent his son to see the plaintiff at Bucknall, in Staffordshire, and inquire of him if he had signed the deeds. The plaintiff, who was unable to understand the object of this inquiry, told the son that he had executed the deeds and forwarded them to Crealock. No further inquiry was made of the plaintiff by Stephen's son, and it did not appear that he had been instructed to do so. On the same day Stephens wrote to Crealock, demanding the delivery to him of the reconveyance. Crealock replied that the reconveyance would not leave his possession until the accounts between them were settled. On the 29th of August Stephens threatened Crealock that he would write to Mr. Heath, "to explain the cause of this delay, and this 222] will naturally lead to my going into all the *particulars attending the case." Crealock replied, "If you do it will simply end in this—that instead of my being able to hand you the deed, or the *cestuis que trust* the money, I must return Mr. Heath the deed and call my creditors together, and you must take your chance with the rest."

Stephens thereupon sent his son down to Aberystwith to get the reconveyance from Crealock. Young Stephens saw Crealock on the 2d of September. During this interview Crealock explained his position, and that he had lost in speculations the £3,080 paid by Stephens in 1859, and a good deal more, including a sum of £700 owing to Stephens. Young Stephens said he would not allow Price's purchase to be completed until his father got the reconveyance. Ultimately, however, young Stephens agreed, on his father's behalf, not to attempt to enforce payment of the debt of £700, for which a fresh promissory note was given, except in certain contingencies, and to allow Crealock £100, such sum being intended to cover every claim for costs relating to anything done or thereafter to be done by Crealock in connection with any of Stephens' property in mortgage to Major Bowen's trustees or otherwise. The reconveyance was then handed over to young Stephens by Crealock, and Price, who was waiting outside, was called in and completed his purchase, paying his purchase-money (£1,500) to Crealock, who handed him his conveyance (already executed by Stephens) and some title deeds. The 21st of September was appointed by

Crealock as the day on which he would attend in London to complete the transaction. The plaintiff came up to London to meet him, but Crealock did not keep his appointment. On the same day however, a Mr. Tweed, as the agent of Crealock, called on Messrs. Budd and told them that he had absconded, handing them the following written statement:

"In February, 1859, Mr. Stephens applied to sell a portion of his property, and a part was sold for £3,080. The vendor was Mr. Stephens alone, but the money was received by Mr. Crealock, and invested by him in his own name on various securities, and ultimately lost. The interest was regularly paid by Mr. Crealock. The second sale was completed 2d September, and the purchase-money (£1,500) was received by Mr. Crealock. Mr. Crealock's proposal is to give Mr. Heath a bond for £4,900, the amount due *by [223 him to the trust estate, and to pay interest thereon at the rate of 4 per cent. per annum, and to hand over a policy in the Economic Insurance Company for £6,000 as a collateral security, and to hand over all the deeds in his possession relating to the estate, and to be released. The security for the £3,100 still due is by Mr. Stephens stated to be ample."

On the 22d of September Crealock, from his retreat at Ostend, addressed a long letter to Tweed, which repeated in greater detail the substance of the above statement, and the terms on which alone he was prepared to treat, stating that "until my release from the trust and all past liabilities thereof, except so far as the provision or payment of interest and premium on policy to secure the principal debt, is handed in exchange to me for same, not one shred of parchment will leave the custody in which they now are in. Of course I have not left them at my office; it would be hardly likely I should do that."

Under these circumstances the plaintiff had filed his bill against Crealock and Stephens; Lewis, Beavan and Pugh (the purchasers in 1859); and Price, the purchaser in 1870, charging that his signature to the deed of reconveyance was obtained from him by Crealock by fraud, and that Stephens was a party to such fraud, and alleging that the connection of Stephens with the frauds committed by Crealock was evidenced by his joining Crealock in concealing the evidence of the mortgage upon the alleged sale in 1859, and by his sending his son in August, 1870, to inquire whether the deeds of conveyance and reconveyance had been executed by the plaintiff; and charging that he (the plaintiff) was entitled as against Stephens, and all persons claiming under him (who

either directly or indirectly through their solicitors had notice of the mortgage security), to require that no portion of the property still subject to the mortgage security should be redeemed except upon the terms of payment, as well of all such moneys as might not have been paid off to Crealock from time to time by means of the frauds referred to, as also of all such moneys as had through the collusion of Stephens come to the hands of Crealock without the knowledge of the plaintiff, and, in particular, that the £3,080, and £1,500 (allowed by Stephens to pass into Crealock's hands), 224] were still a charge *upon the property now comprised in such security. All knowledge of the transactions of 1859, and any authority to Crealock to receive the £1,500 in 1870, were distinctly denied by the plaintiff. The relief prayed by the bill was (1) that the deed of reconveyance to Stephens of the property stated to have been sold in 1859 might be ordered to be delivered up to be cancelled; (2) that Stephens might be ordered to hand over the same, and be restrained from passing the said deed to the alleged purchasers of the property comprised therein, or any person claiming under them, and from passing to such purchasers, &c., the legal estate affected to be dealt with by such reconveyance, and from dealing with such deed in any manner detrimental to the interests of the plaintiff as mortgagee and owner of the legal estate comprised in such deed; (3) a declaration that Stephens had not discharged himself of his liability to pay to the plaintiff the £3,080 and £1,500, but was still liable under his mortgage deed of the 24th of November, 1856, to pay such sums, and all interest thereon, and a declaration that the said sums were still a charge upon the properties comprised in the mortgage security, and that the properties alleged to be comprised in the reconveyance, and the property alleged to have been sold to Price, were still subject to the said mortgage security; (4) an account of principal and interest due on the mortgage security, and in default of payment by defendants other than Crealock, a foreclosure; (5) that upon redemption all proper directions be given for vesting in the redeeming defendants any estate still remaining vested in Crealock in the properties redeemed; and (6) that, upon foreclosure, the defendants Lewis, Beavan, Pugh, and Price, might be ordered to deliver up to the plaintiff, or as the court should direct, all deeds and writings in their custody or power relating to the properties comprised in the mortgage security.

The defendant Crealock had not returned within the jurisdiction, and the mortgage deed of November, 1856, was still

in his possession. He had put in an answer admitting the receipt and misappropriation of the money in 1859 and 1870, but exonerating Stephens (who was, as far as he knew or believed, in utter ignorance of his dealings with the money) from all participation in the breaches of trust complained of in the bill; and also stating that *the conveyances [225 to the purchasers in 1859 were executed by Stephens wholly on the faith of his (Crealock's) undertaking to procure a reconveyance of the property, and his explanations of the impossibility of then obtaining it from the plaintiff's absence abroad; and that although Stephens had joined in concealing from the purchasers the existence of the mortgage, it was done without any fraudulent intention on his part towards the plaintiff.

The other defendants had all put in answers, and as the nature of their defence will sufficiently appear from the arguments and the judgment, it will be sufficient to state that the purchasers of 1859 and 1870 insisted upon their title as purchasers for value without notice, and the protection afforded by the court to persons in that position; that the plaintiff was by his own act and deed estopped from denying the receipt of the purchase-money and the execution of the deeds of conveyance and reconveyance, and that if fraud had been committed, as alleged by the plaintiff, that he himself, by his own gross and culpable neglect, and his misplaced confidence in his co-mortgagee, had largely contributed to that fraud, and that he, rather than the purchasers, who were wholly innocent, must suffer for it.

Stephens insisted that the charges made against him by the bill that he had been a party to Crealock's frauds, that he obtained a fictitious credit from Crealock and paid him a price for getting a false receipt, and that he colluded or combined with him for the purpose of deceiving the plaintiff and the purchasers, were untrue and unjustifiable. He also relied upon the receipt given by Crealock in 1859, and that signed by the plaintiff in 1870, as valid and effectual discharges for the amounts mentioned therein.

Mr. *Kay*, Q.C., and Mr. *Bedwell*, for the plaintiff: Stephens had full knowledge of, and deliberately concurred in, the fraud practised by Crealock, and cannot avail himself, or the purchasers from him, of the legal estate which was fraudulently obtained from the plaintiff by means of the reconveyance; and he is a bare trustee of that legal estate for the plaintiff. His payment to Crealock, one of two trustees, made not only without any authority from the plaintiff, the other trustee, but with knowledge *that the [226

plaintiff was ignorant of the transaction, is not such a payment as will discharge him from the mortgage debt: *Webb v. Ledsam* ⁽¹⁾. With respect to the defendants Lewis, Bevan, and Pugh, who purchased from Stephens in 1859, and claim, as purchasers for value without notice, to be entitled to hold the deeds then handed over to them, as a protection against the plaintiff's claim, we say that as those deeds were fraudulently handed over by Crealock in breach of his trust, the defendants (who have not acquired the legal estate) are not entitled to derive any benefit from that fraud, or to retain possession of the deeds against the plaintiff claiming under his prior legal mortgage, and representing the *cestuis que trust*: *Thorpe v. Holdsworth* ⁽²⁾; *Newton v. Newton* ⁽³⁾.

Mr. *Fischer*, Q.C., and Mr. *W. Barber*, for Stephens: The charges raised by the bill against Stephens, of complicity and concurrence in Crealock's fraud, are not sustained by the facts of the case. He has been equally victimized. He has paid the mortgage debt, and though guilty of negligence, his negligence has not been of such an extent as to amount to constructive fraud within the rule laid down in *Evans v. Bicknell* ⁽⁴⁾. In the absence of fraud on the part of Stephens, or knowledge of, or participation in Crealock's breach of trust, the receipt given by Crealock for himself and his co-trustee for their joint debt binds the plaintiff, and operates *pro tanto* as a good discharge to Stephens of the mortgage debt. At law payment to one of two joint creditors and production of such a receipt is a good discharge as to both: *Husband v. Davis* ⁽⁵⁾; without alleging any authority from the other to receive the money: *Wallace v. Kelsall* ⁽⁶⁾. Either of the two trustees had a right to receive the money, and Stephens is effectually discharged in this court as well as in a court of law: *Charlton v. Earl of Durham* ⁽⁷⁾.

As to the £1,500, we rely upon the receipt signed by the plaintiff and the reconveyance.

227] *Mr. *Amphlett*, Q.C., and Mr. *Crossley*, for Beavan and the executors of Lewis (two of the purchasers in 1859): Having purchased for valuable consideration, without notice of plaintiff's mortgage, from Stephens, who was in possession with an apparently good title in fee simple, we are entitled to avail ourselves of every honest defence, however

⁽¹⁾ 1 K. & J., 385.

⁽²⁾ Law Rep., 7 Eq., 139.

⁽³⁾ Ibid., 4 Ch., 143.

⁽⁴⁾ 6 Ves., 174, 191.

⁽⁵⁾ 10 C. B., 645.

⁽⁶⁾ 7 M. & W., 264.

⁽⁷⁾ Law Rep., 4 Ch., 433.

technical. The root of the plaintiff's case is a mortgage executed by Stephens, but the mortgage deed is not produced, and there is no proof, either by evidence or by admissions, that such a mortgage was ever executed. It is alleged that the deed is in the possession of Crealock, but what evidence is there of any steps taken to procure it, or that Crealock is unwilling to produce it? There being, therefore, no conclusive evidence of the impossibility of producing, or proving the loss of the original document, secondary evidence of its contents cannot be admitted. But assuming that secondary evidence is admissible, what evidence is there of the accuracy of the copy which is tendered? and being a mere copy of a copy it is no evidence of the missing original document: *Taylor on Evidence* (¹); *Roscoe on Evidence* (²). Nor is the reconveyance any evidence of the mortgage, which is not produced, as against the defendants, who were not parties to it, and therefore were not bound by the recitals therein contained. But if held binding on the defendants, then the recitals that the plaintiff has received the mortgage money, and the receipt for it signed by him, are no less binding upon him.

There is no evidence of any trust affecting the money, and the plaintiff and Crealock must be regarded as mere joint tenants equally entitled to the money. So far, therefore, as Crealock's moiety is concerned, the plaintiff cannot recover.

We rely on our title as *bona fide* purchasers for value without notice, who, according to the well-established doctrine of equity, will not be deprived of any advantage they have gained by the possession of the deeds or otherwise, and against whom the court will not "stir to give any assistance": *Head v. Egerton* (³); *Walwyn v. Lee* (⁴); in which case the only difficulty pressing upon Lord Eldon was that the plaintiff, who there sought discovery and delivery of the title deeds of an estate mortgaged by his father, *had [228 got possession, but the ultimate decision was that against a purchaser for valuable consideration without notice this court gives no assistance. This protection has been extended to the case of a purchaser of an equity only, who is equally entitled "by way of defence to avail himself of the character of purchaser without notice, and to have the bill dismissed against him, though the next hour he may be turned out of possession by the legal title": *Bowen v.*

(¹) § 497.

(²) Page 15.

(³) 3 P. Wms., 280.

(⁴) 9 Ves., 24.

Evans ('). Again, in *Joyce v. De Moleyns* ('), Lord St. Leonards says: "The defence of a purchase for value without notice is a shield as well against a legal as an equitable title; . . . in this court they have a right to say that they ought not to be compelled to deliver up the deeds, as they obtained them *bona fide* and without notice."

This application by Lord St. Leonards to the case of a merely equitable title of the protection afforded by the plea of purchase for value without notice, though questioned, has never yet been overruled: *Frazer v. Jones* ('); *Attorney-General v. Wilkins* ('); and has been expressly recognized in the House of Lords in *Colyer v. Finch* ('); where Lord Cranworth says that "the principle on which the court protects a purchaser for valuable consideration without notice is not confined to the case of a purchaser for valuable consideration who has got the legal estate. . . . It may be that he has not the legal estate, but that will be quite unimportant as to a court of equity interfering or refusing to interfere." Again, in *Hunt v. Elmes* (') a decree for foreclosure having been made against a subsequent purchaser without notice, at the suit of the prior mortgagee ('), that part of the decree by which the deeds were ordered to be delivered up to the mortgagee was reversed: *Thorpe v. Holdsworth* ('); where the defendants were ordered to produce the deeds in their custody for the purposes of a sale of a moiety of the property, in which they were not interested, only shows that Vice-Chancellor Giffard, though he considered himself bound by *Wallwyn v. Lee* ('), and *Joyce v. De Moleyns* ('), would not, if the matter had been *res integra*, have extended the rule to equitable *interests. So in *Newton v. Newton* (') the rule was not disputed, but it was held not to apply to a case where the person proposing to create the charge was a mere stranger, and had no interest whatever in the subject matter which he purported to charge.

[The VICE-CHANCELLOR referred to *Gibson v. Overbury* ('), where it was held that the assignees of a bankrupt could not recover in trover a policy of assurance effected by the bankrupt, and deposited by him before his bankruptcy with the

(1) 1 J. & Lat., 178, 264.

(2) 2 Ibid., 374, 377, 379.

(3) 17 L. J. (Ch.), 353.

(4) 17 Beav., 285.

(5) 5 H. L. C., 905, 920.

(6) 2 D. F. & J., 578.

(7) 28 Beav., 631.

(8) Law Rep., 7 Eq., 139.

(9) 9 Ves., 24.

(10) 2 J. & Lat., 374.

(11) Law Rep., 6 Eq., 135; Ibid., 4 Ch., 143.

(12) 7 M. & W. 555.

defendants as a security for a balance due to him, and for a further sum then lent.]

But we do not require the assistance of *Joyce v. De Moleyns* (¹), or the other cases which show that the court will not interfere against the purchaser for value without notice of a mere equity, as we have got the legal estate and have acquired a perfectly good title by estoppel.

The conveyance by which Stephens purported to convey to us the legal estate acted as an estoppel against him, and the reconveyance executed by the plaintiff operates to feed that estoppel by perfecting the title in Stephens, which he purported to pass to us in 1859: *Smith's Leading Cases* (²). Then it is said that the reconveyance is tainted by the fraud of Crealock, under which it was obtained, and therefore that it is wholly inoperative. But the rule that third parties cannot derive any benefit from the fraud, does not apply to the case of a purchaser for valuable consideration without notice, who will not be deprived by a court of equity of any advantage at law which he has fairly obtained for his protection: *Eyre v. Burmester* (³). Such a purchaser's plea of a purchase for valuable consideration without notice, "is an absolute, unqualified, and unanswerable defence, and an unanswerable plea to the jurisdiction of this court." When once the terms of the plea have been satisfied, "this court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage, which he has obtained, whatever it may be:" *Pilcher v. Rawlins* (⁴); *Carter v. *Car-* [230 *ter* (⁵). We further say, that as between ourselves and plaintiff, we have the better equity. The question being who is to bear the loss occasioned by Crealock's fraud? we submit that plaintiff, who trusted as his agent a man who has turned out to be a knave, must suffer for that fraud rather than defendants, who have been guilty of no negligence, have trusted no one, and honestly taken a conveyance on the faith of which they have paid their money: *Hunter v. Walters* (⁶); *Pilcher v. Rawlins* (⁷). Nothing that we, the purchasers, could have done, would have discovered the fraud, whereas the plaintiff, who might have prevented it, has by negligence in his duty as trustee contributed to its commission. We have, therefore, the better equity, and the court will not interfere in favor of the

(¹) 2 J. & Lat., 874.

(²) Vol. i., p. 79, ii. 671.

(³) 10 H. L. C., 90, 108.

(⁴) Law Rep., 7 Ch., 259, 268.

(⁵) 8 K. & J., 617.

(⁶) Law Rep., 7 Ch. 75, 85.

(⁷) Ibid., 7 Ch., 259, 273.

plaintiff to disturb our title as purchasers for value without notice.

With respect to Price, against whom the bill must be dismissed with costs, the plaintiff has no equity to throw the £1,500 received from him by Crealock upon these defendants.

Mr. *Eddis*, Q.C., and Mr. *Ingle Joyce*, for Pugh, adopted the same line of argument, and referred to *Sugden's* Vendors and Purchasers ⁽¹⁾, for a summary of the law as to the protection afforded in equity to a purchaser for value without notice.

Upon the operation of the doctrine of estoppel in favor of the defendants, they cited *Sturgeon v. Wingfield* ⁽²⁾.

Mr. *Hardy*, Q.C., and Mr. *Charles Browne*, for defendant Price.

Mr. *Kay*, in reply: It is not competent for the defendants to dispute the existence of the plaintiff's mortgage, as their admissions contain a full copy of it. We prove that Crealock always (and the plaintiff never) had possession of the mortgage deed, and that he absolutely declines to part with that or any other document except upon terms which cannot possibly be complied with. "This being a case, therefore, where the loss or destruction of the paper may almost be presumed, very slight evidence of its loss or destruction is sufficient" to entitle "the plaintiff to give secondary evidence of the paper or deed: *Brewster v. Sewell* ⁽³⁾. It is said that we ought to have given notice to produce to Crealock's solicitor, before this secondary evidence can be admitted; but when notice to produce is a mere idle form, it may be dispensed with: *Cates v. Winter* ⁽⁴⁾; *Taylor on Evidence* ⁽⁵⁾; and the courts will favor the sufficiency of the notice whenever the circumstances of the case warrant them in so doing: *Bryan v. Wagstaff* ⁽⁶⁾. Upon the merits, the plaintiff is entitled to undo the fraud and set aside the transactions based upon it entirely, and the defendants who have not acquired the legal estate even as against Stephens, cannot avail themselves of the plea of purchasers for value without notice. If Stephens and Crealock have no valid defence to the plaintiff's claim, the defendants claiming under them can have none. The technical doctrine of estoppel has no application whatever, and in any case could not affect the plaintiff's rights as against persons who are neither parties nor privies to the reconveyance.

⁽¹⁾ Pages 607, 608.

⁽²⁾ 15 M. & W., 224.

⁽³⁾ 3 R. & A., 296, 299.

⁽⁴⁾ 3 T. R., 306.

⁽⁵⁾ Pages 438, 448.

⁽⁶⁾ Ry. & Mood., 327.

But these defendants have got no legal estate, but only a mere equity, the legal estate being in Stephens, who obtained it by fraud, and is a bare trustee of it for the plaintiff. The reconveyance which the plaintiff was induced to execute for a special purpose, and to carry out a pretended sale, was executed and delivered upon condition, and until that condition was fulfilled was a mere escrow, "that is as a scroll or writing which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes:" *Stephens' Comm.* (*). There was no complete delivery of it in any sense, so that it cannot be recalled. But, in any case, complete or not complete, the reconveyance can be obtained back with the estate from Crealock and Stephens, by reason of their fraud, and no right can be set up by the defendants (who have merely an equity) against the plaintiff's right, there being no case in which a subsequent purchaser has been allowed to avail himself of the plea of purchase for value, against the fraud of his vendor, unless he has obtained some legal advantage. The defendants are not, therefore, entitled to retain the deeds [232 as against the plaintiff's prior legal mortgage, which gives him a right to call upon the purchasers from the mortgagor, to redeem at once, or in default, to be foreclosed: *Colyer v. Finch* (*); nor even as against his equitable title, *Newton v. Newton* (*), where the court, going a step beyond *Thorpe v. Holdsworth* (*), ordered the deeds to be not only produced but to be delivered up, in order to assist the plaintiff, whose prior equitable title was established, in working out his right; so as not to make an obviously incomplete decree by leaving the title deeds in the possession of one of the defendants claiming to hold them under an adverse title which had been declared by the same decree to have no valid foundation. In leaving the deed in the hands of Crealock, the plaintiff has not been guilty of negligence so as to affect his right to relief; it being settled that trustees are justified in committing the custody of the deeds to one of themselves, and that where the deeds are a security for money, possession by the one is no authority from the co-trustee to him who holds them to receive the principal money secured: *Lewen on Trusts* (*). We ask for a sale instead of a foreclosure of the mortgaged property, as the more convenient form of decree: 15 & 16 Vict. c. 86, s. 48.

Mr. *Amphlett* replied upon the points raised in reply:

(*) Vol. i., p. 503.

(*) Law Rep., 7 Eq., 139.

(*) 5 H. L. C., 905.

(*) Page 483.

(*) Law Rep., 6 Eq., 185; *Ibid.*, 4 Ch., 143.

It is not open to plaintiff at the bar to set up the reconveyance as an escrow, inconsistently with the pleadings, which treat it as executed and delivered absolutely and not conditionally: "In the delivery of a deed as an escrow, the form of words used in the delivery must be apt and proper, as: 'I deliver this to you as an escrow, to deliver to the party as my deed, upon condition that, &c.,' and the delivery must be to a stranger; for if a person delivers a deed to the party himself to whom it is made, as an escrow, upon certain conditions, the delivery is absolute, and the deed will take effect immediately," *Cruise's Dig.* (1); *Sheppard's Touchstone* (1); *Co. Litt.* (1).

As to the form of decree, the plaintiff suing as mortgagee 233] must *make out a special case in order to induce the court to order a sale when the mortgagor or subsequent incumbrancer dissent: *Morgan's Chan. Acts and Orders* (1).

Dec. 10. SIR JAMES BACON, V.C.: The question to be determined in this case is one of considerable difficulty and of great importance. Difficult, because of the somewhat complicated facts attending parts of the case, and because it is necessary to ascertain in what manner a loss which has been sustained shall be borne among persons some of whom are not morally culpable in respect of the circumstances which have led to the loss; and important, because of the principles by which the decision of this court must be guided in such like cases, which are unhappily of not unfrequent occurrence:—[His honor, after stating the facts of the case, continued:—]

The defences to this suit are various, as are the interests of the several defendants—and their several cases are necessarily the subject of different considerations. But the first to be regarded is that of the defendant Stephens, who denies all liability in respect of the misconduct of Crealock, insists upon the validity of the deeds of conveyance and reconveyance of 1870, and alleges that he was a bare trustee of the legal estate which he thereby acquired for the purchasers from him in 1859 of the property which was in that year sold by him to them. It becomes, therefore, necessary to consider the conduct of Stephens, and the nature of his dealings with Crealock. I have pointed out the relation in which they stood to each other. The accounts stated between them, which have been put in evidence, show that their pecuniary dealings were such as would take place between a solicitor and client, or between principal and agent, customer and banker; and that in all these transactions Crealock

(1) Tit. xxxii. 'Deed,' ch. ii., ss. 93, 94.

(2) Page 58.

(3) Page 36 (a).

(4) Page 205.

lock acted, as was considered by Stephens as acting, not as trustee for others, but as conducting and accounting for the business of Stephens alone. When the sales in 1859 took place the whole sum of £3,080 was received by Crealock—although upon the account as it then stood a balance was due from him to *Stephens after debiting himself with [234 that sum, and when Stephens procured the delivery of the title deeds he must be taken to have known that Crealock had no right to deliver those deeds. After the time when the deeds were so delivered, by which Stephens was enabled to deduce a title to the portion sold by him, and after the completion of the several purchases, Crealock gave Stephens a receipt, dated the 23d of February, 1859. Upon this receipt Stephens now relies, and insists that it is a good discharge at law and in equity. In my opinion there is no ground for any such contention. Mr. Heath, the plaintiff, was at this time in England; his residence and position were well known; there could be no difficulty in communicating with him, and it is clearly proved that until 1870 the plaintiff had no notice or intimation that there had been any transaction by which the mortgage security could be in any degree affected. Without dwelling on the fact that Stephens is a lawyer, I think that, having regard to the true nature of his dealings with Crealock, it is obvious that he chose to trust him (as far as he did trust him) in his individual character of his agent or banker, and not as a trustee who had the authority of his co-trustee for acting as he did. It would be in the highest degree dangerous, and opposed to all the principles of this court, if it were to be held that by any such proceeding as was here resorted to, the validity of the mortgage made to two trustees could be impeached or affected, because one of them has been allowed, and more than allowed, by the mortgagor to betray his trust. In the year 1865, the Central Wales Railway Company required and took a small portion of the mortgaged property (15 perches sold for £10), and upon that occasion a conveyance was approved and executed by Stephens, in which the plaintiff and Crealock, described as mortgagees in fee of the hereditaments described, acting in pursuance of the power of sale vested in them as such mortgagees—and the defendant Stephens, described as the owner in fee of the same hereditaments subject to the mortgage, convey to the company the premises “which, with certain other hereditaments, were, by an indenture dated the 24th of November, 1856, made between Stephens of the one part, and the plaintiff and Crealock of the other part, conveyed subject to redemption by Stephens of

of the principal sum of £7,700 with interest." And upon 235] this occasion the £10 was *paid to and received by Stephens with the consent of the mortgagees.

Excepting some correspondence between Crealock and Stephens, which is set forth in the pleadings, but to which I do not find it necessary to refer more particularly, nothing seems to have taken place from 1859, when Stephens, representing himself to be the absolute owner of the portions sold, had conveyed those portions to the several purchasers, until the year 1869, when he contracted to sell another portion for £1,500 to William Price, one of the defendants. The necessity of procuring a reconveyance of so much of the mortgaged property was then urged. In the face of the act of Parliament (22 & 23 Vict. c. 35) Mr. Stephens felt himself compelled to disclose the fact of the existing mortgage, and the two deeds I have before mentioned were accordingly prepared. Mr. Stephens at this time—August, 1870—seems to have distrusted Crealock, as, indeed, after the letters of March and August, which I have before referred to, he might well do:—[His honor then referred to the transactions of August and September, given in the statement, and the following passage in the answer of Stephens: "The said deed of reconveyance was handed by the defendant Crealock to my son for me as herein-before stated, and is now in my possession. It has, in fact, been in my possession ever since it was so handed to me, but not previously thereto. I do not intend to attempt to make any terms whatever with the purchasers of the property comprised in the said sales for £3,080 for whom I am, as I am advised and submit, a bare trustee without any beneficial interest whatever, nor do I intend to endeavor to pass the legal estate to them, unless they demand it, which I believe they are entitled to do, or without the sanction of this honorable court, and I altogether deny and dispute that the plaintiff is entitled to set up or maintain the position assumed on his behalf in par. 22 of the bill."]

That is, in plain English, "having in 1859 represented to purchasers that I was the owner (as I was not) of the portions I then sold and purported to convey to them with the assistance of Crealock as my solicitor; those purchases being completed by the payment of the purchase-money, part of which was received by Crealock as my agent, and such part 236] as he did receive being *included in an account current between him and me, I insist and rely upon a form of receipt which he gave to me, which is not only informal and unbusinesslike and wholly ineffectual, but which is untrue

in its terms, and wholly inconsistent with the true state of the case. And I further insist that, knowing that no portion of the £3,080 had been duly applied, but that it was due from Crealock to the trust estate, that he was wholly without the means of paying it, and that he must call his creditors together if the fact of his delinquency should be exposed to the plaintiff, his co-trustee, I not only permitted but procured the payment to him by Price of £1,500, and made the delivery of the reconveyance to me a condition precedent to his receiving the latter sum"—a reconveyance which was, and is, wholly fraudulent; and upon these grounds he suffers this cause to come to a hearing. And his counsel have complained that the bill charges him with fraud! That he has acted with most singular negligence is not disputed; that the plaintiff, if he is not entitled to the redress he seeks, will have suffered most grievously by that negligence and imprudence is apparent; and if I could explain satisfactorily the conduct the defendant Stephens says he practised in August and September, 1870, I would willingly accept an excuse for such conduct, but I can find none.

As far, then, as Stephens is concerned, I am of opinion that the plaintiff is entitled to the relief he seeks; to have it declared that the reconveyance of the property sold and conveyed in 1859 has been obtained by the defendant wrongfully, and that he be ordered to deliver it up to be cancelled; and a further declaration, that the whole of the original mortgage debt due from the defendant Stephens remains charged upon the whole of the hereditaments comprised in that mortgage, except only so much as has been conveyed to Price, against whom, as a purchaser for valuable consideration without notice, the bill must be dismissed with costs. Beyond this there will be the ordinary decree for account of principal, interest, and costs.

The cases of the other defendants, Lewis, Beavan and Pugh, whose cases may be considered as one for the purposes of this suit, remain to be considered. They are no doubt purchasers for value without notice, and are entitled to all the protection which the *rules and the practice of [237 the court extend to persons in their position; and they are entitled to avail themselves of any just objection, technical or otherwise, to the plaintiff's demand. And in the exercise of this right it has been argued by their counsel that there is no sufficient evidence of the original mortgage deed. Let us see how this stands. The fact is abundantly admitted by the defendant Stephens, as well in the pleadings as by the copy which he has furnished of the deed itself, and

by the recitals in the deeds executed by him. It is further sufficiently proved that the deed is, or ought to be, in the possession of Crealock, and that it is out of the power of the plaintiff to compel the production by him. All that the law of evidence requires is, that the best evidence of which the case is susceptible shall be adduced; and although the defendants say, and say truly, that no admission by Stephens or Crealock can be used as direct evidence against them, they are nevertheless subject to the rule I have stated. The defendants have in no part of their answer raised any direct issue on this point. They nowhere dispute the existence of the mortgage as it is alleged by the plaintiff. The utmost they say is, "if there was such a mortgage, and if it is still subsisting"—then their defence is so and so. In my opinion, this form of pleading does not make it incumbent on the plaintiff to prove the mortgage more directly against them. Their defence is, that they are purchasers for value, &c.; and they plead and say in substance: "We care not whether there was, or was not, or is, or is not, the mortgage, for supposing there is, we have a title which your mortgage cannot disturb." If I thought there was any weight in the objection, I should have directed the cause to stand over that better evidence might be adduced by the plaintiff; but I do not think so, not only for the reason I have mentioned, but because the defendants, each and all of them, rely upon the reconveyance of 1870, which contains a full recital and recognition of the mortgage, and proceeds upon the footing of its validity and existence, and one of the defendants sets it out in his answer *in extenso*. Their defence, on the ground of their being purchasers for value without notice, was that which was most insisted on, and that because the bill prays the delivery up of the title deeds. I think, however, that the argument on this subject has been pressed 238] beyond its legitimate *extent. It is true that a court of equity will not assist a person having a claim against a purchaser for value without notice. But there the rule stops; nor is there any difference between the rules in equity, and those which prevail at common law. If my chattel is stolen I can compel its restitution, in some cases by action, in others by summary proceedings before a magistrate. If my land is transferred, no matter by what form of transfer, I can bring ejectment; and there is a reason apparent, at least sufficient to form a basis for the rule—that a court of equity will not actively assist a person who can assert his right at law. But if the relief I claim is foreclosure, or realizing the subject pledged to me, the rule and the reason

cease to be applicable, and I know of no case in which, where the suit has been to foreclose, or to realize a thing charged or pledged, a subsequent title, however innocently acquired, has been held to be a sufficient defence to such a claim. Certainly none of the cases cited furnish any authority for such a proposition. In *Head v. Egerton* (*) the plaintiff's bill prayed foreclosure and the delivery of title deeds. A subsequent mortgagee pleaded to so much of the bill as prayed delivery of title deeds, that he was a purchaser for value, &c., and his plea was allowed; but I have no reason to suppose, either from the report or from the nature of the case, that the plaintiff's title to foreclose was affected by the allowance of the plea. *Wallwyn v. Lee* (") was a similar case. The bill was not to recover the estate but for delivery up of title deeds. The plea was only to so much of the bill as sought the discovery and delivery of the title deeds; and that plea was allowed, Lord Eldon saying: "The principle of the court is, that against a purchaser for valuable consideration without notice this court gives no assistance." *Joyce v. De Moleyns* (") was an administration suit, and the bill sought to compel the delivery of deeds which had come into possession of the defendants without notice. Lord St. Leonards dismissed the bill against them, as he expressly says, on the authority of *Wallwyn v. Lee*, which he considered to be in point. In *Newton v. Newton* (") Lord Hatherley considers the two cases I have last mentioned, and points out the distinction between them and cases in which the *bene- [239] ficial interest in the estate was properly subject to the decision of a court of equity. In that case the decision of the Master of the Rolls (") was reversed, not upon the law, but upon the facts, the Lords Justices coming to a conclusion different from that of the Master of the Rolls; but Lord Hatherley desired to be understood as not entertaining any opinion adverse to that expressed by the Master of the Rolls upon the question of law, the Master of the Rolls having decided as matter of law that the defendant was compellable to deliver the title deeds. In *Hunt v. Elmes* (") the plaintiff, a mortgagee of an entire estate, filed a bill of foreclosure against the defendant who, upon subsequently purchasing a part of the estate, had the title deeds of the entirety delivered to him by a fraudulent solicitor. The plaintiff's right to foreclose, which had been declared by the decree, was varied by omitting from it that part which ordered the delivery up

(*) 3 P. Wms., 280.

(*) 9 Ves., 24.

(*) 2 J. & Lat., 874.

(*) Law Rep., 4 Ch., 143.

(*) Law Rep., 6 Eq., 135.

(*) 2 D. F. & J., 578.

of the deeds. The point does not seem to have been argued; no authorities were referred to upon it, and the plaintiff was a mortgagee for a term only. In *Thorpe v. Holdsworth* ⁽¹⁾, before Vice-Chancellor Giffard, it was held that the possession of title deeds by a puisne mortgagee did not give him priority, and that although the court could not order the defendant, who was an incumbrancer for value, &c., to be deprived of the custody of the deeds, yet, a sale being ordered, the production of the deeds for the purpose of the sale was ordered; and the Vice-Chancellor said, that upon the application of a purchaser (who by the order was to be at liberty to apply at Chambers as he might be advised) he should not hesitate to order the deeds to be delivered to the purchaser. But in *Colyer v. Finch* ⁽²⁾ a case which appears directly applicable came to be decided. The bill was by Finch for foreclosure against Colyer, a subsequent purchaser without notice. The Master of the Rolls ⁽³⁾ states the law thus: "If the suit be for the enforcement of a legal claim, or the establishment of a legal right, then, although this court may have jurisdiction in the matter, it will not interfere against a purchaser for valuable consideration without notice, but leave the parties to law; if, on the other 240] hand, the legal title is perfectly clear, and *attached to that legal title there is an equitable remedy, or an equitable right, which can only be enforced in this court, I have not found any case, nor am I aware of any, where this court will refuse to enforce the equitable remedy which is incidental to the legal right;" and he made a decree for foreclosure in the ordinary form, from which Colyer appealed. On the hearing of the appeal ⁽⁴⁾, *Joyce v. De Moleyns* ⁽⁵⁾ and other cases were cited in support of the appellant's contention, that he was a purchaser for value without notice. Lord Cranworth, in the course of the argument ⁽⁶⁾, expressed doubts whether the rule of not interfering against such a purchaser applied to a case of foreclosure; and in delivering his reasons for the judgment ⁽⁷⁾ he notices the argument that the court will not interfere, and thinks that an "entire fallacy." He says that there is no difference whether the purchaser has or not the legal estate. "His equity depends on this, that he stands equitably in at least as favorable a position as his opponent, and therefore the court will not interfere against him. But I think that that doctrine cannot by possibility apply to the case of a bill of foreclosure."

⁽¹⁾ Law Rep., 7 Eq., 189.

⁽⁵⁾ Ibid., 509.

⁽²⁾ 19 Beav., 500.

⁽⁶⁾ 5 H. L. C., 905.

⁽³⁾ 2 J. & Lat., 374.

⁽⁴⁾ 5 H. L. C., 915.

⁽⁷⁾ Ibid. 920, 921.

Then, after referring to the reasons for so holding pointed out by the Master of the Rolls in his judgment⁽¹⁾, he goes on: "But I should proceed on a much shorter ground. For the purpose of that question, whether the court would interfere against a purchaser for valuable consideration without notice, a foreclosure is not relief at all. The mortgagee who seeks foreclosure stands in such a position to the mortgagor, or the purchaser from the mortgagor, for valuable consideration without notice, that that purchaser can at any time file a bill to redeem the mortgage, and that being so, it would be most unjust if there was not a correlative right on the part of the mortgagee to say, 'You shall redeem now, or you shall never redeem.'"

This being, as I consider, a most clear authority applicable to the case before me, I am led to consider what are the rights of the parties in this foreclosure suit. That the legal estate was duly vested in the plaintiff and Crealock by force of the mortgage deed *of 1856 I take to be conclusively established. That by the conveyance of 1859 to the several persons who then purchased from Stephens no legal estate passed, seems to me to be equally clear. They could not buy, and he could not sell, what he had not. All that they could take and all that he could give, was an equitable interest. I see no reason to doubt that they could at any time file a bill to redeem the plaintiff's mortgage and to foreclose Stephens; but this was the very utmost extent of the interest they acquired. That they have great reason to complain of the manner in which they were dealt with is obvious; but how can the plaintiff be made answerable for that, or why are his legal and equitable rights, one of which is to foreclose against his mortgagor and all persons claiming under him, to be affected? The reply which the defendants make to these inquiries is contained in their several answers, which are, in this respect, in the same terms:

(*J. W. Lewis*): "I say that plaintiff is by his own act and deed estopped from denying or challenging my title to the property so purchased by me. I claim the benefit of the said deed of reconveyance executed by plaintiff in August, 1870, and sent by him or his solicitors to defendant William S. Crealock, and of every aid to my title or advantage resulting therefrom. I claim the benefit of the receipt and discharge contained in and indorsed upon the said deed of reconveyance and signed by plaintiff and defendant Crealock. I say that defendant Stephens is a bare trustee for me of the legal

(1) 9 Beav. 510, 511.

estate in the said property so purchased by me, and that I am the person at present having the best right to claim the conveyance of that legal estate, and I claim the same accordingly. Further, I say that I am a *bona fide* purchaser for valuable consideration, without notice of fraud or wrongdoing, and I claim the advantage of all the doctrines of this court in favor of a person standing in this position. Lastly, I say that if fraud has been committed, as alleged by plaintiff, that he himself, by his own gross and culpable neglect, and his misplaced confidence in his co-mortgagee, has largely contributed to that fraud having been committed; and that as I am wholly an innocent party, and he is in my view of the case a person who has contributed by his negligence to 242] the result which has ensued, he has made out no *case against me, and that, so far as I am concerned, his bill ought to be dismissed with costs."

And upon this it was argued that the plaintiff is estopped by his conveyance of 1870 procured by a direct fraud, Stephens knowing that the validity of the deed must depend upon the payment to the trustees of the sum mentioned as the then present consideration expressed in that deed, and knowing that not only was the sum not paid by him, but that Crealock was in such a hopeless condition of insolvency that if it was not paid the trust estate must lose it, procures that deed to be delivered to him and takes it as the price of his permitting the other sum of £1,500 to be received by Crealock; if Stephens, having sold and conveyed to the defendants, the purchasers, without a title, had afterwards obtained a perfect title, then, as between him and them, his subsequent title would no doubt have fed the estoppel, and would have entitled them to have their originally defective title made perfect by him. But the principle of estoppel applies only between parties and privies, and if the estate supposed to be acquired by Stephens under the reconveyance is destroyed by the cancellation of that conveyance, and before any estate can have passed from him to them, there can exist no food for the supposed estoppel; and the defendants, the purchasers, are reduced to the position in which they would have been if no reconveyance had been executed, it being wholly out of the question to suggest that any equity exists as between them and the plaintiff. If any authority were required to support a proposition so plain in law and so consonant with justice, it would be found in *Eyre v. Burmester* ⁽¹⁾, which was referred to in the course of the argument. The defence upon this ground failing—as, in my

(1) 10 H. L. C., 90.

judgment it does wholly fail—the case is reduced as to all the defendants to a simple case of foreclosure. However much I may regret that loss, trouble, and expense should be inflicted upon perfectly innocent persons as the defendants, the purchasers, undoubtedly are, I am compelled, in justice to the plaintiff, to declare and order that the deed of reconveyance be cancelled, the consequence of which is that the plaintiff is entitled to all such rights as he would have possessed if that deed had never been executed. *An ac- [243 count must be taken of what is due in respect of the original mortgage for principal, interest, and costs, and Stephens must be ordered to pay the amount which upon taking such account shall be found to be due; and upon his failure to pay, and upon the defendants, the purchasers, declining or failing to pay such amount, the plaintiff will be entitled to realize his security. Under the circumstances of this case, it appears to me that the proper and just mode of realizing that security is by a sale of the whole of the mortgaged hereditaments, excepting only that part which has been conveyed to the defendant Price, and for the purposes of such sale, if and when it shall be made, the defendants must be ordered to produce the title deeds in their respective possession, and to deliver up such title deeds to whoever may be the purchaser or purchasers; and liberty will be given to the plaintiff to apply in Chambers as may be necessary to give full effect to this part of the decree.

Solicitors: Messrs. *Budd & Son*; Messrs. *Thomas White & Sons*; Messrs. *Batty & Whitehouse*; Messrs. *Comb & Wainwright*; Messrs. *Clarke, Son, & Rawlins*.

[Law Reports, 18 Equity Cases, 243.]

V.-C.B., April 21, 1874.

POWELL V. RAWLE.

[1871 P. 41.]

Will—Legacy—Forfeiture of Legacy if not "claimed" within Three Months.

Direction by codicil to executors to invest £200 and pay the proceeds to testator's daughter, a single woman, for life, for her separate use, and after her death, the capital to be for her children; with a proviso that if the bequest should be not "duly claimed" by the daughter within three calendar months after testator's decease, the bequest should lapse.

The legacy was not claimed by the daughter. She alleged that she did not hear of the legacy or of the testator's death till nearly two years after he died; and it was admitted by the executors that no notice was given to her by them:

Held, that the legacy had become forfeited, and had lapsed.

FURTHER consideration.

Charles Powell, who died on the 18th of March, 1869, by his will, dated the 8th of May, 1865, amongst other devises and bequests, gave a legacy of £250 to one of his children, Helen Jane Powell.

244] *By a codicil dated the 9th of March, 1869, the testator directed as follows:

"I hereby revoke the legacy of £250 given by my said will to my daughter Helen Jane Powell, and in lieu thereof direct my said executors to invest the sum of £200 in the names of two or more responsible trustees to be appointed by my said executors, and to pay the proceeds of the same sum to my said daughter Helen Jane Powell during her life, for her own absolute use, free from the control of any husband with whom she may intermarry, and after her decease the said capital sum to be in trust for all and singular the lawful children of my said daughter, equally, share and share alike, as tenants in common, and not as joint tenants. And I declare that the trustees so to be appointed by my said executors shall have all usual trustees' powers, whether given by act of Parliament or otherwise: Provided always, and this bequest is upon the express condition, that if the said bequest be not duly claimed by my said daughter within the space of three calendar months next after my decease, that then the said bequest shall lapse, and the amount thereof fall into and be considered as part of my residuary personal estate and be applied accordingly."

The bill, which was filed on the 11th of March, 1871, by the executors, for administration, alleged that at the time of the testator's decease it was not known to the plaintiffs where the defendant Helen Jane Powell resided, nor whether she was still alive, or had ever been married, or had any issue, and consequently no notice was given to her, or to any other person who might claim to be interested in the bequest of £200 in the said codicil contained, in favor of her and her children, of the conditions upon which the bequest was made, and under the circumstances no formal claim to the bequest was made by her within three months after the testator's decease; also that one of the defendants representing the residuary legatees alleged that the bequest of £200 had lapsed and that the amount was now distributable among the residuary legatees.

By a voluntary answer and an affidavit, the defendant Helen Jane Powell submitted that the legacy of £200 had not been forfeited, though she did not claim the same within three months after the testator's death. She said she claimed

the legacy as soon *as she was informed of it: that the [245 trustees gave her no notice of it; and that she did not hear of it, or of the death of the testator, until February, 1871. Had she known, she would have claimed. She further submitted that if the court should be of opinion that the clause of forfeiture took effect by her not having claimed the legacy, yet the forfeiture should not be extended beyond her own life interest, and that the legacy ought to be retained and paid to her children at her death.

The above point was now mentioned.

Mr. *Swanston*, Q.C., and Mr. *Ingle Joyce*, for the plaintiffs: The circumstances that the legatee did not know of the legacy having been left to her, and that no notice was attempted to be given to her by advertisement or otherwise, will not avail, if the condition has been unperformed: *Burgess v. Robinson* (*); *Davis v. Angel* (*).

The VICE-CHANCELLOR: This is a very hard case. The bill itself alleges that no notice was given to the legatee.

I have every wish to decide against the forfeiture if I can lawfully do so.

Mr. *Henry Fawcett* (Mr. *Kay*, Q.C., with him), for Helen J. Powell: The only suggestion to be offered in opposition to *Burgess v. Robinson* is, that as this legacy was an act of bounty, there was nothing which Miss Powell could by any act known to the law "duly claim," and hence that the clause of forfeiture is void. At least Miss Powell's life estate only will be forfeited.

The VICE-CHANCELLOR: What act was this lady to do? In what capacity was she to have claimed?

Mr. *Swanston*: I suppose as a creditor.

The VICE-CHANCELLOR: I fear that the words are too strong. Nor can the life estate be separated from the remainder. The fund must fall into the residue.

Solicitors: Mr. *John Frost*; Mr. *Alfred Bilton*.

(*) 8 Mer., 7.

(*) 81 Beav., 223.

[Law Reports, 18 Equity Cases, 246.]

V.-C.H., March 11, 1874.

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*MUTLOW V. BIGG.

[1873 M. 29.]

Express Trust—Statute of Limitations (3 & 4 Will. 4, c. 27), s. 25—Land on trust for Sale—Residuary Gift.

Under a devise of land upon trust for sale, the proceeds to be considered as part of the personal estate, the trustees allowed part of the land to remain unsold for fifty years:

Held, that the trust was an express trust within sect. 25 of the Statute of Limitations, and a decree for the execution of the trust of the unsold land made at the suit of a residuary legatee.

Pasey v. Barnes (1) distinguished.

EDWARD BIGG, by his will, dated the 6th of January, 1820, after giving certain legacies, made the following disposal: "I give to my son E. S. Bigg, and my daughters S. A. and E. F. Bigg, whom I appoint executor and executrixes of this my will, my freehold houses in Fenchurch Street and Fenchurch Buildings, to hold the same to my said executor and executrixes in trust to sell and dispose of the same, and to convert the same into money, and the money arising by such sale to be considered as part of my personal estate; and I give all the rest, residue, and remainder of my estate and effects whatsoever and wheresoever, freehold, copyhold, and personal, to hold to them as tenants in common, their several and respective heirs, executors, administrators, and assigns, forever."

The testator died on the 23d of July, 1823, and his will was proved by E. Smith Bigg and Sarah A. Bigg, on the 8th of November, 1823.

Besides the freeholds specified in the will, the testator died possessed of certain freeholds in Seven Dials, and of considerable personal estate. The executor entered into possession and sold the real estate, and paid his sisters sums on account of the interest on their shares, but never paid them the capital sums of the testator's estate to which they were entitled under the will. The daughter Emma Frances, shortly after the testator's death, went to reside with her brother, and died on the 9th of May, 1844, intestate. E. Smith Bigg took possession of her estate, but did not obtain letters of administration of her estate till 1859. Sarah *Anne Bigg died on the 18th of July, 1865. E. Smith Bigg died in Feb-

(1) 20 L. J. (Ch.), 393.

ruary, 1871, having appointed his sister, the defendant Lucy Bigg, his executrix.

On the death of E. Smith Bigg, his sister, the defendant, Lucy Bigg, took possession of his real and personal estate.

On the 25th of January, 1873, administration *de bonis non* of the estate of Emma Frances Bigg was granted to her niece Mary Ann Mutlow, the plaintiff.

The bill was filed in 1873, by William Mutlow and Mary Anne his wife, as administrators of Emma Frances Bigg, and prayed for execution of the will of the original testator, Edward Bigg, against Lucy Maria Bigg, the executrix of E. Smith Bigg, and S. H. Bigg, his heir-at-law. Two of the houses of the testator Edward Bigg, situate in Fenchurch Street, remained unsold. The defendants by answer set up the Statute of Limitations.

Mr. Dickinson, Q.C., and Mr. Bunting, for the plaintiff: This is an express trust for the sale of the real estates, and the relation between the trustee and the *cestui que trust*, the land not having been sold, is still subsisting; there has never been an adverse possession of the freehold so as to take the case out of the 25th section of the statute: *Sugden's Real Property Statutes* (1), and the cases there cited.

Mr. Morgan, Q.C., and Mr. Marcy, for the defendants: In *Pawsey v. Barnes* (2), where a testator devised his real estate to trustees on trust to sell, and the will was proved in 1816, but no claim was made by the persons entitled to the proceeds until after the death of the surviving executor, in 1849, it was held to be too late. It is true that the case was not decided on the statute.

In *Bowyer v. Woodman* (3) it was held that a married woman entitled to a charge on land could only claim six years' interest, viz., that the claim was within the 42d section of the 3 & 4 Will. 4, c. 27; moreover, this is in effect a gift of residue, and a residue charged on land is within the statute: *Sheppard v. Duke* (4), and *Prior v. Horniblow* (5).

*There is clear laches in this case in the face of [248 which this court will not give relief. In *Ward v. Arch* (6) it was held that under the trust for sale the real estate must be held to be converted, and in that case the parties entitled to the proceeds might have applied immediately. In *Dickenson v. Teasdale* (7) it was held that a trust to pay debts was not an express trust within the act.

(1) Page 99.

(2) 20 L. J. (Ch.), 893.

(3) Law Rep., 3 Eq., 318.

(4) 9 Sim., 567.

(5) 2 Y. & C., Ex., 200.

(6) 15 Sim., 382.

(7) 1 D. J. & S., 52.

SIR CHARLES HALL, V.C.: The plaintiff is entitled to a decree. His claim is not to a legacy, but to a share of property given specifically to trustees to be sold for persons who were beneficial owners. The property given is real estate, which was held upon a trust for sale. Nothing has been done to effect their rights, no transfer, no sale; and the 25th section of the statute seems expressly applicable to the case. As regards the 40th section, it seems to me to have no application, except perhaps as regards the proceeds of that part of the property which has been sold. The part with which this bill seeks to deal is *in specie*.

With regard to the cases cited: In *Pawsey v. Barnes* (1) the property had been sold in the year 1839, and therefore that case has no application where the property exists in specie. In *Boyer v. Woodman* (2) the question arose on the 42d section of the act. After *Gough v. Bult* (3), Lord St. Leonards' opinion, and *Burrowes v. Gore* (4), I must hold that the proceeds of the sale of land, where there is an express trust, are within the 25th section. It has been argued that there is not an express trust of the land, the proceeds of sale being directed to be part of the personal estate, and the same persons being trustees and executors; but this mode of declaring the trusts does not make the proceeds of sale personal estate so as to exclude the 25th section. There must be a decree in favor of the plaintiff, confined to the property which remains *in specie*.

Solicitors for the plaintiff: Messrs. *Singleton & Tattershall*.

Solicitors for the defendants: Messrs. *Prior, Bigg, Church & Adams*.

(1) 20 L. J. (Ch.), 328.

(2) Law Rep., 3 Eq., 318.

(3) 16 Sim., 323.

(4) 6 H. L. C., 907.

[Law Reports, 18 Equity Cases, 259.]

M.R., May 1, 4, 1874.

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*PATTISSON V. GILFORD.

[1874 P. 40.]

Injunction—Threatened Violation of Legal Right—Bill quia timet—Right of Shooting over Estate—Sale of Estate for Building Purposes.

In order to obtain an injunction restraining a threatened act on the ground that, if done, it will be a violation of some legal right, the plaintiff must show that the act must result in a violation of such right.

The owner of an estate, the shooting over which had been let for a term of years,

issued particulars of sale of the estate in thirteen lots, stating that the estate contained several plots of accommodation and building land suitable for the erection of villas and residences, and describing one lot in particular as well situated for the erection of a house. The particulars showed that it was intended to make a road through the estate and dedicate it to the public; but gave full notice of the right of shooting:

Held, that the court would not, at the instance of the owner of the right of shooting, interfere to prevent the intended sale.

IN 1871 the plaintiff became tenant for a term of twenty-one years (determinable by the plaintiff at the end of the first seven or fourteen years), under a Mr. Legh, of a farm of 480 acres, known as Kilnwood Farm, at Fay Gate, in Sussex, and at the same time Mr. Legh agreed by letter to let to the plaintiff for the same term the right of shooting over an estate known as "Caryll's," of about 188 acres, and divided from Kilnwood by a turnpike road. The Caryll's estate contained valuable coverts, the right to shoot over which was a main inducement to the plaintiff to take a lease of Kilnwood Farm.

Mr. Legh had recently sold the Caryll's estate to the defendant, who, towards the end of February, 1874, caused to be inserted in the newspapers a preliminary notice of an intended sale of the estate, in thirteen lots, for building purposes. This notice contained no reference to the plaintiff's right of shooting.

On the 5th of March the plaintiff's solicitors wrote to the defendant, referring to the advertisement, and stating that the proposed sale would render the shooting entirely valueless, and threatening legal proceedings unless the sale were withdrawn, or the property offered to be disposed of in such a way as not to interfere with the plaintiff's rights. [260 On the 6th of March the defendant's solicitors wrote a reply, admitting the plaintiff's right, and stating that it was intended to offer the property subject to it.

The defendant subsequently issued particulars of sale of the estate in thirteen lots, to take place by auction on the 1st of April, 1874. It was stated in these particulars that the estate comprised "several plots of accommodation and building land delightfully situate and suitable for the erection of villas and residences," and one of the lots was described as "well situated for the erection of a house." It appeared from a plan that it was intended to make a road across the estate; and the particulars contained the following observations:

"The tenant of the Kilnwood Farm (adjoining Caryll's) is, during his tenancy, entitled to the shooting (except rabbits) over the whole, or the greater portion, of the lots, and all the lots affected by such right will be sold subject thereto.

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"The purchasers of lots 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13 are to maintain and keep in repair the new road about to be made by the vendor and shown upon the plan hereto annexed, abutting upon each of those lots, until such road shall be dedicated to the public or taken to by the parish, in proportion to the respective frontages of such lots to such road."

The bill was filed on the 27th of March, 1874, alleging, amongst other things, that the defendant threatened and intended, in order to assist his building speculation, to grub up the hedgerows and plantations and wholly to destroy the coverts on the estate, and praying for an injunction to restrain the defendant from offering the Caryll's estate for sale for building purposes, or for grubbing up the hedgerows or plantations thereon, or from proceeding with the construction of the said intended road, or otherwise dealing with the estate, so as to interfere with or prejudice the due exercise and enjoyment by the plaintiff of his right of shooting over the same.

Upon an affidavit echoing the bill an *ex parte* order according to the prayer of the bill was made on the 28th of March, the plaintiff giving the usual undertaking as to damages.

Notice of motion was given for the 15th of April. On 261] that day *the motion was by consent turned into motion for decree, and now came on to be heard.

It appeared by the evidence that the defendant had staked out the intended road, and had cut through two hedges at places where such road passed through them, but that he had not grubbed up or destroyed any of the plantations or coverts, and had no intention of so doing.

Mr. *Fry*, Q.C., and Mr. *Cookson*, for the plaintiff: It is clear that the intended sale is to be made for building purposes, and if it is carried out the result must necessarily be that the shooting will be utterly destroyed. Even the making of the road will materially damage the plaintiff's right. But the plaintiff is not bound to show damage; he is, in this court, in the position of a lessee of the shooting with a covenant for quiet enjoyment, and is entitled to enforce the covenant if infringed, without regard to the amount of damage. This doctrine was recognized in the recent case of *Leech v. Schweder* (¹), though the appeal court differed from your honor as to what was included in the covenant.

Under these circumstances the plaintiff may file his bill at once against the defendant, and is not bound to wait till the purchase is completed, and then file bills against the thirteen purchasers.

(¹) Law Rep., 9 Ch., 463.

Mr. *Southgate*, Q.C., and Mr. *North*, for the defendant, were not called upon.

SIR G. JESSEL, M.R.: I do not think I can give the relief that the plaintiff asks. I have a strong notion that the defendant would have done something wrong if the plaintiff had not written him a letter, but the answer to the letter was, "Look at my particulars of sale;" and I must look at them. The plaintiff in substance claims a right of shooting over some land with a covenant for quiet enjoyment, not actually under a demise, but under an agreement by letter, which in this court amounts to a demise. He now comes for an *injunction in effect, though not in terms, to [262] restrain the defendant from interfering with this right. I granted an interim injunction on an assertion in an affidavit that the defendant was going to grub up and destroy the plantations, and if that had been proved, I should have continued the order. But the facts now established are wholly different. All the destruction that the defendant has committed is limited to this—that he has made a small road across the estate, and in making it has cut through two hedges; and it is not now pretended that that will interfere with the shooting in any way. What the defendant is actually doing is this—he is putting up the property for sale in thirteen lots, under particulars of sale which state that it comprises "several plots of accommodation and building land delightfully situate and suitable for the erection of villas and residences." Then, under the title "Observations," there comes this: [His honor read the sentences set out above.]

It appears that the defendant has staked out a road and taken down the hedges so as to enable it to be made, and it is clear that it is intended to be dedicated to the public. But the particulars do not contain any representation as to any particular portion of the estate being building ground; and, in fact, the defendant, having received the plaintiff's letter, has, no doubt, carefully abstained from representing that any part of the land is immediately available for building purposes. If a man sells land in that way, telling the purchaser that during his tenancy another person has the right of shooting, and if it turns out that the land cannot be built on without interference with the right of shooting, he in effect tells the purchaser this: "Recollect, you must make some arrangement with the person holding the right of shooting before you can build. All I say is, that the property is well situated for building, admirably situated for the erection of a house, only before you erect your house

you must either get the leave of the person entitled to the right of shooting, or wait till the expiration of the lease of the shooting." There is no representation to the purchaser that he can immediately proceed to build irrespective of that right.

Now, what are the principles upon which this court interferes? I take it that, in order to obtain an injunction, a plaintiff, who complains, not that an act is an actual violation of his right, but *that a threatened or intended act, if carried into effect, will be a violation of the right, must show that such will be an inevitable result. It will not do to say a violation of the right may be the result: the plaintiff must show that a violation will be the inevitable result. On that point there are some well-known authorities. The case usually cited is a decision of Lord Cottenham, *Haines v. Taylor* (¹), and there it was laid down that if the act threatened to be done could by any possibility be done in such a way as not to prejudice the right, it would not be restrained, and that it was not sufficient to say that it probably would prejudice the right. In that case it is said, "The court refuses the motion, not because it has formed an opinion as to the legality of what it is alleged that the defendants are about to do, but simply because the plaintiff has not brought before it circumstances which enable it to interfere between the parties." The principle is this: If you say the defendant is going to do an unlawful act, you must prove that it is necessarily unlawful; it is not enough to say it may be unlawful. Again, in the case of the *Emperor of Austria v. Day* (²), the Lord Chancellor says: "I consider this court has jurisdiction by injunction to protect property from an act threatened which, if completed, would give a right of action. I by no means say that in every such case an injunction may be demanded as of right; but if the party applying is free from blame and promptly applies for relief, and shows that by the threatened wrong his property would be so injured that an action for damages would be no adequate redress, an injunction will be granted." Then, in *Tipping v. Eckersley* (³), which I hold to be good law, it is laid down, that if there is an express covenant, such as a covenant for quiet enjoyment, then damage is not necessarily to be shown, it is sufficient to show that there is a breach of the express covenant; but at all events, you must show that there is a breach. All these observations would apply if the defendant were actually threatening to erect villas. It does not by any means follow

(¹) 2 Ph., 208, 210.

(²) 3 D. F. & J., 217, 240.

(³) 2 K. & J., 264.

as of necessity that the erection of one or two villas will injure the right of shooting; that depends upon the part of the estate on which the villas are built, the number of villas, and the size of them, and so on. There may or may not be *injury, and I should hesitate long before I [264 granted an injunction against a defendant, over whose estate there existed a right of shooting, to prevent his building a single house. Of course a great deal would depend on the extent of the property, and the nature of the coverts, and so on; but I should require to be satisfied, according to the authorities, that by the erection of a house, or even two houses if the estate was a large one, injury must necessarily and inevitably follow. When I say inevitably, I do not use the word in the sense of there being no possibility the other way, because I think courts of justice must always act upon the theory of very great probability being sufficient; all I mean is that there must be such a great probability, that, in the view of ordinary men, using ordinary sense, the injury would follow. But in this case the defendant is not going to do anything of the kind; all he is going to do is what he has an undoubted right to do, to sell the estate. He may sell it in several lots, or in one lot, as he thinks fit; and he may tell the purchaser anything he likes in praise of the estate—that it is beautifully situate, that it is well adapted for building. He must not tell the purchaser, “You may build upon it forthwith, you will not injure the right of shooting;” but he does not do that; all he says is, “There are some plots” (one of which is particularly pointed out) “very eligible for building purposes; but recollect, there is a right of shooting over all the plots, and you take subject to that right, and you must be careful not to make such an erection as will interfere with this right of shooting.” That is the effect of the particulars. No cautious man who understood the particulars would buy that land for immediate building purposes; he would see the difficulty which he would get into with regard to the owner of the right of shooting. Then it is said, What is the owner of the right of shooting to do if you cut up an estate in a great number of lots? Is he to sue the owner of each lot? That is his misfortune. He has no contract with the landlord not to sell his estate in lots. If it was desirable not to accept a grant of the right of shooting except on those terms, he should have stipulated for them. I know of nothing that prevents a landlord who has granted the right of shooting over his estate from afterwards selling his estate in lots. You may have fifty *lots or 500 lots. It might be very incon- [265

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venient for the owner of the right of shooting if he had to sue a great many parties and bring a great many actions; but still I take it his right of shooting is not necessarily interfered with by the mere division of the estate in lots. Then, is it interfered with by the purchasers of the lots being told "Some of the lots are very well situate for building;" when they are told at the same time, "It is subject to the right of shooting?" I cannot hold that it is. The mere telling them what is the fact, that these are eligible building sites, though not immediately available on account of the right of shooting, is not an interference with the right of shooting. Altogether, I cannot see how the plaintiff has a right to come to this court for relief under these circumstances. I shall dismiss the bill, and the costs must follow the result.

Mr. *Southgate* asked for an inquiry as to damages.

SIR G. JESSEL, M.R.: Yes; I think you are entitled to that.

Solicitors: Messrs. *Nickinson, Prall & Nickinson*; Messrs. *Ashurst, Morris & Co.*

[Law Reports, 18 Equity Cases, 265.]

M.R., May 4, 1874.

JONES V. LLOYD.

[1874 J. 89.]

Practice—Pleading—Suit by Person of Unsound Mind not found so by Inquisition—Next Friend—Dissolution of Partnership—Notice to dissolve—Withdrawal of Notice.

A person who has become permanently insane, but has not been so found by inquisition, may maintain a suit by his next friend for the protection of property in which he is interested as partner.

Permanent lunacy of a partner is a ground of dissolution at the instance of the lunatic as well as of the other partner.

A bill was filed by a next friend on behalf of a person of unsound mind not so found by inquisition, against the partner in business of the plaintiff, alleging that the plaintiff had for some time past been suffering from softening of the brain and was of unsound mind, and that it would be for his benefit that the partnership should [266] be dissolved; and praying that the *partnership might be dissolved and accounts taken, and the share of the plaintiff in the assets secured for his benefit, and for a receiver:

Held, on demurrer, that the suit could be maintained.

Whether a decree for final dissolution can be made in such a suit without the appointment of a committee in lunacy, *quære*.

The jurisdiction of the Court of Chancery with respect to suits instituted by persons of unsound mind, not so found by inquisition, by next friends, considered.

The articles of partnership between the plaintiff and defendant provided that either partner should be at liberty to determine the partnership at the end of the first seven years of the term, on giving previous notice to the other partner of his intention to

do so. The plaintiff having become insane, the defendant served on him notice of his intention to determine the partnership at the end of the first seven years of the term :

Held, that the notice could not be withdrawn without the consent of the plaintiff.

DEMURRER.

The bill was filed by Joseph Jones, described as a person of unsound mind not so found by inquisition, by Edward Brettell, his next friend, against Lewis Lloyd, and contained allegations to the following effect :

In April, 1867, the plaintiff and defendant entered into partnership as chain-cable, anchor, and nail manufacturers, at Cradley, in Worcestershire, for a term of fourteen years from the 31st of March then last. The articles of partnership provided, that at the end or determination of the first seven years of the term, or if either partner should without the consent of the other do any of the wrongful acts therein enumerated (none of which the defendant was alleged to have done), then in the first case it should be lawful for either partner, and in any of the other cases it should be lawful for the other partner, by giving notice in writing to the partner so offending, or leaving the same for him at the counting-house of the partnership for the time being, to determine the partnership from the time when such notice should be given or left. And then and in such case the share and interest of such offending partner of and in the effects belonging to the partnership should be ascertained, and he should have such an allowance in lieu of profits, in addition to the interest on his share of the capital, and the amount thereof respectively should be paid, and such instruments should be executed in relation to his share and interest, as if he had died on the day of such determination.

*The business was carried on by the plaintiff and defendant in accordance with the articles of partnership, until about three years before the filing of the bill, when (according to the 6th paragraph of the bill) the health of the plaintiff failed, and, owing to softening of the brain, he became, and had ever since continued, incapable of attending to business, and was then in fact of unsound mind.

On the 17th of September, 1873, the defendant gave written notice to the plaintiff of his intention to dissolve the partnership on the 31st of March, 1874, when the first seven years thereof would expire. Various differences arose between the defendant on the one hand and the family and advisers of the plaintiff on the other, in taking the partnership accounts, and on the 28th of March, 1874, the defendant served on the plaintiff the following notice :

"To Mr. Joseph Jones, of Cradley, Worcestershire, chain and nail manufacturer. I hereby withdraw and abandon the notice, dated the 17th day of September, 1873, served by me upon you of my intention to dissolve our partnership on the 31st day of March, 1874, under our articles of partnership dated the 15th day of April, 1867."

The 14th paragraph of the bill alleged that the plaintiff was of unsound mind at the date of the service of the above-mentioned notice, and that it was expedient and for the benefit of the plaintiff that the partnership should be dissolved.

The bill prayed that the partnership might be declared to be dissolved from the 31st of March, 1874, that an account of the partnership transactions might be taken, and that what upon taking such account should appear to be due to the plaintiff from the defendant might be decreed to be paid to or secured for the benefit of the plaintiff, the plaintiff thereby offering to pay what, if anything, should be found due from him to the defendant; that the property of the partnership might be sold under the direction of the court, and the produce thereof paid to or secured for the benefit of the plaintiff and defendant, according to their respective rights and interests therein; and for a receiver.

The defendant demurred.

268] *Mr. *Fisher*, Q.C., and Mr. *Maitlow*, for the demurrer: As a rule, no doubt, notice of dissolution given to a lunatic partner operates as a dissolution of the partnership; *Robertson v. Lockie* (*), *Mellersh v. Keen* (*); but in this instance the notice was irregular, as it was not given at the end or determination of the first seven years of the term, so the defendant was at liberty to withdraw it.

There being then no actual dissolution of the partnership, the question is, whether the plaintiff is entitled to come to this court to have it dissolved. Permanent insanity (which is not alleged to exist here) is a ground for a decree for dissolution at the suit of the other partner, because of the insane partner's incapacity to conduct the business according to the terms of the partnership: *Sayer v. Bennet* (*); *Waters v. Taylor* (*); *Jones v. Noy* (*); *Anonymous* (*); but it has not been decided that the insane partner has any right to have the partnership dissolved on the ground of his own incapacity, when the other partner is able and willing

(*) 15 Sim., 285.

(*) 2 V. & B. 299.

(*) 27 Beav., 236.

(*) 2 My. & K., 125.

(*) *Montagu's Digest of the Law of Partnership*, note (c); S. C., 1 Cox, 107.

(*) 2 K. & J., 441.

to perform his part of the partnership contract. At all events, he is not entitled to maintain a suit by a next friend with that object.

[*Mr. Southgate*, Q.C., referred to *Fisher v. Melles* (').]

(¹) M.R., 1870. Mar. 10, 14; June 80.

[1870 F. 3.]

FISHER V. MELLES.

MOTION for decree.

The bill was filed by Joseph Charles Fisher, described as a person of weak mind, by William Jones, his father-in-law and next friend, against William Melles, Henry Roberts, Henry Jones, and John Reid. It alleged in effect that the plaintiff was, and for eighteen months past had been, afflicted with softening of the brain, and in consequence thereof was of weak mind, and his judgment and capacity of understanding ordinary matters had been so weakened and destroyed as to render him unfit to attend to business of importance, or to take part in transactions requiring ordinary intelligence; that Melles had acquired great and undue influence, amounting, in fact, to absolute control over the plaintiff, and taking advantage of his weakness of mind, had induced him to execute a deed intended to have the effect of dissolving the partnership between him and Melles (which partnership was constituted by articles dated in June, 1856, for a term expiring on the 24th of June, 1870), and constituting a new partnership between the plaintiff and the defendants other than Melles, who affected to retire in favor of such other defendants, the share and interest of the plaintiff being considerably reduced by the provisions of such deed; and that the same defendants were at the date of the pretended dissolution well aware that the plaintiff was in such a state of mind and body as to be unable to enter into any contract; yet they, being desirous of procuring the business for their own benefit, without regard to the rights and interest of the plaintiff, arranged with Melles all the terms of his pretended retirement and of the pretended new partnership, and agreed with him that he should procure the same to be embodied in a deed, and should induce the plaintiff to execute the same.

The bill prayed that it might be de-

clared that the deed of dissolution of partnership and the document constituting the alleged new partnership were improperly obtained from the plaintiff, and were respectively void and of no effect, and that the partnership between the plaintiff and Melles was a continuing partnership until the 24th of June then next; and that some proper person might be appointed to manage the business, and that upon the expiration of the partnership the business might be sold; that Melles might be restrained from intermeddling with the property of the partnership and from injuring or using the name of Fisher and Melles, and that the other defendants might be restrained from doing any act in the name of the alleged new partnership, and from continuing in possession of the warehouse, books, and property of Fisher and Melles, and might be ordered to deliver up possession thereof; and for consequential accounts.

Mr. Jessel, Q.C., and *Mr. Stock*, for the plaintiff.

Mr. Southgate, Q.C., and *Mr. Bush*, for the defendants.

March 14. LORD ROMILLY, M.R., made the following order:

"His lordship being of opinion that no case is established against the defendants of undue influence or fraud against the plaintiff, and that the costs of so much of the bill as charges undue influence or fraud ought ultimately to be paid by the next friend of the plaintiff, doth order that the motion do stand over, to enable an application to be made to the Lords Justices of appeal to establish the fact that the plaintiff is a person of such unsound mind as to be incapable of taking care of himself or his property; and any of the parties are to be at liberty to apply as they may be advised."

The plaintiff was subsequently found lunatic by inquisition. The suit was continued by the next friend as committee, and on the 30th of June, 1870, Lord Romilly, M.R., dismissed so much

269] *The proper course would have been to have the plaintiff found lunatic by inquisition, and then to apply in lunacy under sect. 123 of the Lunacy Regulation Act, 1853 270] (16 & 17 Vict. c. 70), for a *dissolution of partnership. Unsoundness of mind gives this court no jurisdiction whatever. The plaintiff may recover his reason, or he may be found lunatic by inquisition; and in either event the suit will be paralyzed: *Beall v. Smith* ('). *Light v. Light* ('), which will be cited on the other side as an authority for a suit instituted in the name of a person of weak mind by a next friend, is in our favor; for the Master of the Rolls, though he made a decree for the protection of the plaintiff's property, yet admitted the force of the objections to the suit, and gave liberty to apply in lunacy as to the application of the property. In *Halfhide v. Robinson* ('), the Lords Justices held that a bill cannot be filed by a next friend, on behalf of a person of unsound mind not so found by inquisition, for dealing with his real estate.

Mr. *Southgate*, Q.C., and Mr. *E. W. Byrne*, for the bill, were not called on.

SIR G. JESSEL, M.R.: This bill raises two questions, one of them of very considerable importance as regards general law, and the other only of importance between the parties. The second of these questions, which I must deal with first, is, whether under the terms of this particular agreement of partnership the partnership has been actually dissolved by reason of a notice given by the defendant. The other question is, whether, if the partnership has not been actually dissolved, the plaintiff, a person of unsound mind not found so by inquisition, is entitled by a suit instituted by a next friend to have it declared to be so. This question branches out into several, which have been argued before me. One question is, whether, if so entitled at all, which is disputed, the plaintiff must not show permanent insanity; and it is said there is no sufficient allegation of permanent insanity. Another is, that the plaintiff can only be so entitled if the court should be satisfied that the partnership will be dissolved in the interests of the lunatic, and there is no allegation to maintain that; and then it is said that in any event 271] no *decree ought to be made at the instance of a per-

of the bill as charged undue influence or fraud, with costs to be paid by the committee, and made a declaration that at the time of entering into the alleged new partnership the plaintiff was not in a fit state of mind to enter into it, and that the same was void, and

directed the accounts to be taken of the partnership of Fisher and Melles.

Solicitors: Mr. *W. Compton Smith*; Mr. *Roberts*.

(¹) Law Rep., 9 Ch., 85.

(²) 25 Beav., 248.

(³) Law Rep., 9 Ch., 378.

son in this position, because it cannot be worked out against the defendant.

Now, the first point is, has the partnership been dissolved independently of the lunacy? That depends upon the construction of the articles of partnership. [His honor referred to the provision for dissolution stated above, and after deciding that the meaning of the articles was, that either partner should be at liberty to give notice a reasonable time before of his intention to dissolve the partnership at the end of the first seven years of the term, and that the partnership was dissolved by the notice of the 17th of September, continued:] Then comes the question, whether on the 28th of March the service of the notice of the defendant's determination to withdraw the former notice could alter the position of the parties? I am clear that it could not. In the first place, it is perfectly well settled that, the first notice being served, if a valid notice, took effect, whether the plaintiff was sane or insane. That has been decided a great many times. *Mellersh v. Keen* (1) was, I think, the last case. Therefore, the first notice would be perfectly valid, though the plaintiff was insane at the time. But how could the second notice be good for anything? If the first notice put an end to the partnership, it altered the position of the parties; and how could a man without the consent of the other party say, I will become a partner again? It is totally impossible that, after a notice of that kind has been given, one party alone could withdraw it without the consent of the other and enter into a partnership again. In my opinion, there is no such power of withdrawal as is claimed by the defendant; and if the first notice were valid, that notice remains unaffected by the attempt to withdraw it.

If that is the right view, there is an actual dissolution of the partnership, and the plaintiff would become entitled to come here under the ordinary jurisdiction to protect the partnership property and to have a receiver and manager appointed.

But there is another ground upon which the bill is framed which I must advert to. The bill is framed also on the ground that in any event the insanity of the plaintiff entitles him by his next friend to have it declared that it is beneficial for him to put an end *to the partnership, or to [272 have that partnership put an end to. I think that such a bill can be filed, and is within the authorities. First of all, I quite agree with what was said on the part of the defendant, that you must have an allegation of permanent insanity

(1) 27 Beav., 236.

—that is, that you must have an allegation of insanity, not merely of a temporary character, for that is the meaning of the rule, and not merely insanity from which it is likely or reasonably possible that a man may recover. Well, I think that is sufficiently alleged here. I do not think that anybody understanding the meaning of language, and having even that slight acquaintance with medical knowledge which every person of ordinarily good education is expected to have, could doubt that the allegation in the sixth paragraph of the bill is an allegation of permanent insanity, and not merely of temporary lunacy, from which a man is likely to recover.

Then it was said, "Even that being so, it by no means follows that the court will dissolve a partnership at the instance of a person of unsound mind not so found by inquisition, at the request of a next friend, for really he is the person asking it, and not the lunatic." To that proposition I also give my cordial assent. I think no court would dissolve a partnership unless it saw it was necessary for the benefit of the lunatic. If it saw it would be for his benefit that the partnership should be continued, as being well managed and the property well taken care of, the court would not interfere. But I find in this bill an allegation in the fourteenth paragraph "that it is expedient and for the benefit of the plaintiff that the said partnership should be dissolved, and the accounts thereof taken by and under the direction of the court;" and I find that followed by a prayer that the property of the partnership, that is, the assets, may be decreed to be paid to or secured for the benefit of the plaintiff, the plaintiff being ready and willing and thereby offering to pay what, if anything, shall be found due to the defendant; that all the property, stock-in-trade, and effects of the said partnership may be got in and disposed of under the direction of the court; that a proper person may be appointed to receive and collect the debts, moneys, stock-in-trade, and effects owing and belonging to the said partnership; and that all proper directions may be given for effectuating the purposes aforesaid. So that I find an allegation that it is for 273] the benefit of the plaintiff, and I *find a prayer for what I call an interim security for the partnership property—I mean the appointment of a receiver, and so on. Can I say, therefore, on general demurrer, which admits all these facts, that it is not to be dissolved at the instance of the plaintiff? I cannot say so, unless it is true that the insane partner has no equity, which was the proposition maintained by one, if not by both, of the counsel for the defendant.

Well, now, that is a proposition of law which it is necessary to examine, and at the same time I will state another proposition which they put forward, and which can be examined conveniently at the same time. It was said that, even assuming there was such an equity, the equity can only be asserted by the committee in lunacy, and cannot be asserted by a bill filed by a next friend. I do not think either of those propositions well founded. I think there is an equity on the part of the lunatic, and I think the equity may be asserted by the next friend. I do not say that it is not desirable that there should be a committee appointed, and I do not say, if this case comes to a hearing, I myself, if I am then the judge to hear it, or the court which may hear it, may not think it desirable that it should not be finally adjudicated upon until some application has been made to the Lords Justices for an adjudication in lunacy and for the appointment of a committee. All that is matter for subsequent consideration. What I have now to decide is, whether the bill itself is maintainable, and whether any interim order for the protection of the property of the lunatic or his share of the partnership property can or cannot be obtained.

On the first point, I think that the old decision of Lord Kenyon is, as adopted and recognized by Lord Eldon and Vice-Chancellor Wood in subsequent cases, quite conclusive. What Lord Kenyon said in *Sayer v. Bennet* ⁽¹⁾ was: "This I will venture to lay down as a general rule: that where there are two partners, both of whom are to contribute their skill and industry in carrying on the trade, the insanity of one of them, by which he is rendered incapable to contribute that skill and industry on his part, is a good ground for putting an end to the partnership; not by the authority of either of the partners, but by an application to a court of justice, and this for the sake of the partner who is rendered incapable, as well *as of the other; for it would be a [274 great hardship upon a person so disordered if his property might be continued in a business which he could not control or inspect, and be subject to the imprudence of another. If this, then, were a case of one of the partners being insane at the present moment, I should not have a particle of doubt to decree the dissolution of the partnership." Now, that means as clearly as possible that there is an equity for the insane partner. The bargain he made was, that certain property called partnership property should be under the joint control of himself and another—not that it should be under the sole control of the other—and that he and the other

(1) *Montagu's Digest of the Law of Partnership*, note (c); S. C., 1 Cox, 107.

should take an active part in carrying on the business and in supervising the arrangements necessary for carrying it on, and that the partnership property should not be risked by the other without his consent. That was his bargain. By the act of God that bargain has become incapable of performance, and he is not able to exercise that supervision over the conduct of the business and the care of the property for which he bargained. Then what I understand Lord Kenyon to mean is, that that has so altered the complexion of matters, has so entirely changed the nature of the contract, that he is no longer bound, and that, even on the part of the lunatic, you may apply to a court of equity, in a proper case, for a dissolution, on the ground of that entire change having taken place in the relations between the parties, and that the equity is not confined to the sane partner, but it is clearly extensible and extended to the case of the lunatic partner. I find the whole doctrine, the whole judgment of Lord Kenyon, approved by Lord Eldon in *Waters v. Taylor* ⁽¹⁾, and equally approved by Vice-Chancellor Wood in the *Anonymous* case ⁽²⁾. Therefore, I take it to be settled law—and when I say I take it to be settled law, I am using the very words that were used by the Vice-Chancellor—that the insane partner has a right to come into this court, of course in a proper case, to have the partnership dissolved.

That, then, being his right, can it be exercised? that is, can a suit be instituted by the lunatic, not found so by inquisition, by his next friend? I have no doubt it can. There is authority upon the subject, and it seems to me so distinct [275] that I have no *occasion really to refer to the reason, for I think the cases of *Light v. Light* ⁽³⁾ and *Beall v. Smith* ⁽⁴⁾ are such authorities; but independently of the unreported case of *Fisher v. Melles*, where I know the point was discussed, and independently of authority, let us look at the reason of the thing. If this were not the law, anybody might at his will and pleasure commit waste on a lunatic's property or do damage or serious injury and annoyance to him or his property, without there being any remedy whatever. In the first place, the Lords Justices or the Lord Chancellor are not always sitting for applications in lunacy. In the next place, if they were, everybody knows it takes a considerable time to make a man a lunatic by inquisition, and his family sometimes hesitate about making him a lunatic, or hope for his recovery, and take care of him in the meantime without applying for a commission in lu-

⁽¹⁾ 2 V. & B., 299.

⁽²⁾ 2 K. & J., 441.

⁽³⁾ 25 Beav., 248.

⁽⁴⁾ Law Rep., 9 Ch., 85.

nacy. Is it to be tolerated that any person can injure him or his property without there being any power in any court of justice to restrain such injury? Is it to be said that a man may cut down trees on the property of a person in this unfortunate state, and that because no effort of his can be made, no member of his family can file a bill in his name as a next friend, to prevent that injury? Is it to be allowed that a man may make away with the share of a lunatic in a partnership business, or take away the trust property in which he is interested, without this court being able to extend its protection to him by granting an injunction at the suit of the lunatic by a next friend, because he is not found so by inquisition? I take it those propositions, when stated, really furnish a complete answer to the suggestion that he cannot maintain such a suit. Of course they do not answer the question as to how far he may carry it; but that he can maintain such a suit for the purpose of protection, for the purpose of obtaining, as in this case, a receiver, I should think there can be no doubt whatever. But how stands it on authority? In the case of *Light v. Light*, the exact point came before my predecessor, and he decided that in a case of trust such a bill could be filed by a lunatic not so found by inquisition, by his next friend. I find in the books of practice the proposition so laid down in the widest sense. But the question came *before the Lords Justices recently [276 in the case of *Beall v. Smith* (¹), which was cited to me by the defendant's counsel, and what do they say? Lord Justice James says this: "The law of the Court of Chancery undoubtedly is, that in certain cases, where there is a person of unsound mind not found so by inquisition, and therefore incapable of invoking the protection of the court, that protection may in proper cases, and if and so far as may be necessary and proper, be invoked on his behalf by any person as his next friend. But every person so constituting himself officiously the guardian, committee, and protector of a person of unsound mind does so entirely at his own risk, and he must be prepared to vindicate the necessity and propriety of his proceedings if they are called in question." Well, here I find an allegation which is to be taken as true on this demurrer, that the bill is for the benefit of the lunatic, and therefore the next friend has so far discharged himself from that *onus*. Then he goes on: "The Court of Chancery is not the curator either of the person or the estate of a person *non compos mentis* whom it does not and cannot make its ward. It is not by reason of the incompetency,

(¹) Law Rep., 9 Ch., 91.

but notwithstanding the incompetency, that the Court of Chancery entertains the proceedings. . . . The court can only exercise such equitable jurisdiction as it could under the same circumstances have exercised at the suit of the person himself, if of sound mind. If there be a trust property in which the person is beneficially interested, the court may, no doubt, deal with it in such manner as it may deem just, and it will, if necessary, ascertain the nature and extent of his interest, and will authorize, and in a proper case compel, the trustee to deal with the lunatic's interest in the trust property for his benefit. But that arises from its inherent absolute jurisdiction over trusts and trust funds. So in a case of partnership, it may make the necessary orders with respect to the partnership and its assets, notwithstanding the incompetency of a partner; but that again is a consequence of its ordinary jurisdiction in partnership matters, which is not ousted or paralyzed by such incompetency." Now no one can deny, I should think, after that judgment, that in partnership matters, in which this court has a primary jurisdiction, that jurisdiction is not ousted or destroyed 277] *by either party becoming a lunatic. It is impossible to doubt, at least I should think so, that if one partner was misapplying the assets, the other partner, though a lunatic not found so by inquisition, could by his next friend prevent such misapplication. So in the same way, if it be as Lord Kenyon puts it, an undoubted hardship on the lunatic that his property should be left at the mercy of his partner, or the whole mode of conducting the business left to the sole discretion of his partner, and that hardship was remediable in a court of equity prior to the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), the same remedy must still remain, and the lunatic must have an undoubted right to say, "This is a case in which it will be for my benefit that the partnership should be dissolved, and therefore I am entitled to some protection for the assets, even before the decree for final dissolution." And he is entitled to submit that case to the judgment of the court, and for that purpose, at all events, to make the necessary application. I do not say—it is not necessary for me to say at the present moment—whether he will or will not obtain a final decree without application to the jurisdiction in lunacy; all I say is, that in my opinion and judgment he can maintain this bill, and this being a general demurrer for want of equity, it must be overruled.

Solicitors: Messrs. *Church, Sons & Clarke*; Mr. *E. Byrne*, agent for Messrs. *Homfray & Holberton, Brierley Hill*.

[Law Reports, 18 Equity Cases, 288.]

V.-C.B., March 16, 1874.

*SHAND V. DU BUISSON.

[283]

[1868 S. 260.]

Foreign Attachment—Jurisdiction—Garnishee—Equitable Assignment.

A. issued an attachment out of the Lord Mayor's Court against B. as garnishee, and C. (a native Indian merchant of Madras) as defendant, thereby attaching for a debt due to A., and contracted in this country, a fund belonging to C. in the hands of B. A's attachment was defeated by a prior attachment issued by D. for an alleged debt due from C., on which judgment was obtained in the Lord Mayor's Court.

The fund having been transferred from the Lord Mayor's into this court:

Held, that as D. had failed on the evidence to establish the validity of his alleged debt, his attachment was fraudulent, and the judgment based thereon inoperative, so that this court had jurisdiction to order payment to A. out of the fund in court of the amount of his debt, with interest from the date of his attachment in the Mayor's Court.

B. having a fund in his hands belonging to C.:

Held, that a bill of exchange drawn by C. on B. for the exact amount of the fund was not an equitable assignment.

The doctrine of *Burn v. Carvalho* (1) considered.

THIS was a bill by the plaintiffs, who carried on business as merchants in Rood Lane, London, under the firm of Shand & Co., for the purpose of enforcing their claim, for which they had obtained a garnishee order in the Lord Mayor's Court, to the balance of a fund which had been paid into this court by the garnishees, as against the defendant, who also claimed to be entitled to the fund, and by virtue of a prior attachment in respect of a debt alleged by the plaintiffs to be fictitious, had obtained judgment in the Mayor's Court.

It appeared that Poolacoora Veerabudra Chetty, a native Indian merchant at Madras, was in the habit of consigning to the plaintiffs, who carried on business as merchants in Rood Lane, aforesaid, with a branch house at Madras, produce for sale by them in London, and at the same time drew bills against such consignments on plaintiffs, who accepted the bills and paid them at maturity, and also sold the produce consigned to them and received the proceeds. *On [284 the 18th of February, 1867, the account between the plaintiffs and P. V. Chetty showed a balance due to the plaintiffs of £752 4s. 2d.

At this time the defendants, Du Buisson and Cleverley, carrying on business under the firm of Henckell, Du Buis-

(1) 4 My. & Cr., 690.

son & Co., held a sum of £1,035 4s. 5*d.* on account of P. V. Chetty.

On the 22d of April, 1868, the plaintiffs commenced an action in the Lord Mayor's Court against Poolacoora Veerabudra Chetty as the defendant, and issued an attachment for their debt against Du Buisson and Cleverley.

On the 12th of June, 1868, the garnishees pleaded to the action in the Mayor's Court, and the plaintiffs subsequently ascertained from them that a prior attachment had been issued on the 12th of March, 1868, in the Mayor's Court by the defendant Poolacoora Sarabiah Chetty for an alleged debt of £1,035 4s. 5*d.*, claimed to be due from P. V. Chetty.

It appeared that on the 24th of October, 1866, Poolacoora Veerabudra Chetty was arrested for non-payment of 35,000 rupees, and lodged in prison at Madras. In February, 1867, he petitioned for his discharge under the Insolvency Acts, but his petition was dismissed with costs, on the ground that he had fraudulently concealed property from his creditors, and an order made impounding his books. P. V. Chetty thereupon endeavored to effect a compromise with his creditors, and authorized Henckell, Du Buisson, & Co. to hold the sum of £1,035 4s. 5*d.*, then in their hands belonging to him, at the disposal of one Beliah Chetty, for the purpose of such compromise. In consequence of the refusal of Beliah Chetty to act in the matter, P. V. Chetty, in June, 1867, applied to the defendant Sarabiah Chetty, who was his adopted son, and requested him to do what he could to carry out the compromise, and especially to advance him money for the purpose of discharging the claims made on him by some of his creditors. According to the defendant's statement he consented to act, provided P. V. Chetty would give him an order on Henckell, Du Buisson & Co. to pay over to him (defendant) the full amount of £1,035 4s. 5*d.* then (as already stated) in their hands belonging to P. V. Chetty. P. V. Chetty agreed to this, and defendant accordingly, as he alleged, paid to certain of the creditors, in discharge of debts due to them from P. V. Chetty, sums [285] amounting to 10,380 rupees. In *consideration of these payments, and pursuant to his agreement, P. V. Chetty gave defendant a bill of exchange for £1,035 4s. 5*d.* on Messrs. Henckell, Du Buisson & Co., in the following terms:

"Exchange for £1,035 4s. 5*d.*

"Madras, 26 Aug., 1867.

"On demand of this first of exchange (second of the same tenor and date unpaid) pay to P. Sarabiah Chetty or order

the sum of £1,035 4s. 5d. for value received, and place the same to account of

“P. Veerabudra Chetty.

“To Messrs. Henckell, Du Buisson & Co.,
London.”

On the 12th of March, 1868, Sarabiah Chetty commenced an action in the Lord Mayor's Court against P. V. Chetty as defendant, for his alleged debt of £1,035 4s. 5d. (the amount then in the hands of the garnishees).

On the 17th of May, 1868, P. V. Chetty, who had a few days previously been adjudged insolvent, died in gaol at Madras.

On the 26th of June, 1868, Sarabiah Chetty's attachment came on for trial in the Mayor's Court, and a verdict and judgment were obtained by him against the garnishees for the sum of £1,035 4s. 5d.

The plaintiffs thereupon filed their bill to restrain Du Buisson & Co. from paying over the £1,035 to Sarabiah Chetty, or any person other than the plaintiffs until the plaintiffs' claim was satisfied, and to obtain payment of their debt with interest thereon from the 18th of February, 1867, and costs of suit, out of the £1,035 which, since bill filed, had been paid into court by Du Buisson & Co., and to restrain the defendant Sarabiah Chetty from proceeding to enforce the judgment obtained by him in the Mayor's Court, which the bill prayed might be declared void and of no effect, on the ground, as charged by the bill, 1, that the alleged debt on which such attachment was obtained was wholly fictitious, and a fraudulent contrivance for the purpose of withdrawing the property of P. V. Chetty from his *bona fide* creditors in this country; and, 2, that even if the alleged debts arose in the manner alleged by Sarabiah Chetty, the alleged payments were made in India, out of the jurisdiction of the Mayor's Court, at the request of and by *per- [286 sons resident in India, so that the Mayor's Court had no jurisdiction to issue the attachment in favor of Sarabiah Chetty.

On payment into court of the £1,035, Messrs. Du Buisson & Co. had been dismissed.

Benjamin Brooks, the assignee in insolvency at Madras of P. V. Chetty, who had been made a defendant, had disclaimed.

Mr. Kay, Q.C., and Mr. W. F. Robinson, for the plaintiffs: The Lord Mayor's Court, being a local and inferior court, is subject to the jurisdiction of this court, and as the attachment obtained by the defendant Sarabiah Chetty was

in respect of an alleged debt, not arising within the city but incurred in India, between parties both resident abroad, this court will restrain the defendant from sweeping away the fund by virtue of his attachment thus improperly obtained: *Mayor of London v. Cox* ⁽¹⁾; *Banque de Cr dit Commercial v. De Gas* ⁽²⁾. Not only was the attachment improperly obtained, the cause of action having arisen beyond the jurisdiction of the Mayor's Court, but on the result of the evidence this alleged debt is shown to be wholly fictitious, and a mere device to sweep away this fund from the *bona fide* creditors of P. V. Chetty. If the attachment relied on by the defendant fails, then he will rest his case on the bill of exchange of the 26th of August, 1867, as having the effect of an equitable assignment. But the indorsement of a bill of exchange gives only a right to the bill, and does not amount to an equitable assignment: *Robey & Co.'s Perseverance Ironworks v. Olier* ⁽³⁾. Moreover, it is clear upon the evidence that no value was given for the bill.

Mr. Jackson, Q.C., and Mr. Bardswell, for Sarabiah Chetty: The security given to us by the document of the 26th of August, 1867, may be informal, but it enures both in substance and in this court as a good equitable assignment in our favor of the fund therein mentioned. Even if it is a bill of exchange, it does not follow that it may not also be a valid equitable assignment. To constitute an equitable assignment, the form is immaterial; no particular words are necessary: any document which shows an intention of giving to the person in whose favor it is drawn the right to receive the property which is made the subject of the document, will be sufficient. Thus, in equity an order given by a debtor to his creditor, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund: *Burn v. Carvalho* ⁽⁴⁾.

We are also in possession of a prior attachment, on which we have obtained judgment in the Lord Mayor's Court, and the plaintiffs are mere creditors (even assuming that their cause of action arose in this country—which we deny, the debt having been contracted by Veerabudra Chetty with the Madras branch of plaintiffs' firm), who have no possible claim in this court except such as may arise from their having wholly failed at law; and with the result of those proceedings, which were properly and successfully taken by defendant, and could only be transferred by a *certiorari*, this court has no jurisdiction to interfere.

⁽¹⁾ Law Rep., 2 H. L., 239.

⁽²⁾ Law Rep., 6 C. P., 142.

⁽³⁾ Law Rep., 7 Ch., 695.

⁽⁴⁾ 4 My. & Cr., 690, 702.

SIR JAMES BACON, V.C.: In my opinion the plaintiffs have very clearly shown and proved that the debt in respect of which they claim was contracted within the jurisdiction of the Lord Mayor's Court, and therefore suable for in that court. The proceedings by attachment in the Lord Mayor's Court on the part of the plaintiffs were perfectly right as far as they went, and they were intercepted by the course pursued by the defendant. The assistance of this court was invoked, and the whole affair is transferred to this court. It has been argued that the proceedings in the Lord Mayor's Court could only be transferred to this court by a writ of *certiorari*, but I am unable to adopt that view. Either by the consent of both parties, or at the instance of one and in spite of the other, the question which arises in the Mayor's Court, together with the fund, is brought into this court, and the plaintiffs desire to have their right adjudicated upon by this court; the assignee of P. V. Chetty, the only claimant to the fund, other than the plaintiff and defendant, having withdrawn. I consider, therefore, that this court has full jurisdiction to decide between these parties the questions raised upon this record, and *that the court can make [288 a decree now as between these parties, and relating to the fund which the court has taken into its possession in order that the rights relating to it may be determined.

Considering, therefore, as I do, that the plaintiffs' rights are just the same as they would have been if they had carried the proceedings in the Lord Mayor's Court to a conclusion, I am bound now to make a decree according to the prayer of the bill, if satisfied that the plaintiffs' claim is established. The evidence of the debt is clear and conclusive, and has not been called in question in the slightest degree. The sum claimed is £752 4s., the balance of an account which is described to have arisen upon the transactions mentioned in the plaintiffs' evidence. Then it is suggested by the defendant that the plaintiffs have no equity to prefer their claim in this court. If I am right in saying that, but for the interference of the defendant, it is a suit which might have been determined in the Mayor's Court, and could only be determined there in one way, the same right exists in the plaintiffs now, and they have in this court an equity which entitles them to the decision in their favor which they would inevitably have obtained in the Mayor's Court but for the defendant's proceedings.

The other objection taken, that there is no proof that the debt was contracted in London, fails in point of fact; for the evidence on that subject is clear and conclusive.

The defendant then raises this case, that the bill of exchange of which he is the holder amounts to an equitable assignment of the debt. I do not desire to narrow the jurisdiction that has been handed down to this court, by which an equitable assignment may be dealt with in this court; but it is entirely new to me to hear that a bill of exchange in an ordinary mercantile transaction in the shape in which this appears, can amount to an equitable assignment of the debt. The note might have been indorsed to any individual, or to any number of people, who might have indorsed it in succession. A mercantile instrument it is in its origin, and in that shape it remains, and has no other validity or effect, and to call it an assignment of a debt would be to call it not by its right name. The other ground upon which the defendant insists upon his right to it is, that he advanced money of his own for the payment of the debt of the 289] debtor, and that upon a contract then *entered into, he was entitled to the money, and that the bill of exchange is only evidence of that contract. That must rest upon evidence, and if I look at the evidence, I cannot say that it seems to me in the slightest degree satisfactory.

His honor, after referring to the evidence, and observing that the account given by the defendant did not, by any means, inspire confidence, and that if it was necessary to inquire into those facts for the purpose of deciding the case, he should not be disposed to adopt the evidence as to the application of the money by the defendant, said that the judgment obtained by defendant in the Mayor's Court was based upon a fraudulent claim, and was utterly void and formed no obstacle to the claim of the plaintiffs, who were entitled to have their debt, which, upon the evidence, was clearly contracted within the jurisdiction, satisfied out of the money in court. The order would be for an account and payment of what should be found due to the plaintiffs in respect of principal, with interest at 5 per cent. from the demand for payment by the proceedings against the garnishees in the Mayor's Court.

Solicitors: Messrs. *Simpson & Cullingford*; Messrs. *Stibbard & Cranshaw*.

[Law Reports, 18 Equity Cases, 290.]

M. R., May 1, 1874.

*ASTLEY V. EARL OF ESSEX.

[290

[1868 A. 120.]

Real Estate—Settlement—Conditional Limitation—Name and Arms Clause—Forfeiture for Non-compliance—Ignorance of Condition—Statute of Limitations (3 & 4 Will. 4, c. 27), ss. 3, 4.

The terms "forfeiture" and "breach of condition" used in the statute 3 & 4 Will. 4, c. 27, ss. 3, 4, are to be read in the largest sense, and extend to forfeitures which operate to accelerate an estate under a conditional limitation, as well as to forfeitures of which the heir-at-law only can take advantage.

Ignorance of a condition annexed to a gift by will does not protect the devisee or legatee from the consequences of not complying with the condition.

An estate was devised in strict settlement, subject to a clause directing that every person who should become entitled in possession under the will should, on becoming so entitled, assume the testator's name and arms; and it was provided, that in case any such person should fail or neglect so to do for twelve calendar months after he should become so entitled in possession, his estate and interest should cease, and the estate should go to the person who should be next in remainder and then *in case*, as if the person so failing or neglecting were then dead. A tenant in tail, who did not comply with the clause, remained in possession of the estate for more than twenty years. At his death the next remainderman was in India, and being ignorant of his rights under the will, did not comply with the clause:

Held, that the tenant in tail had not acquired a title by adverse possession, but that on his death, by virtue of the act 3 & 4 Will. 4, c. 27, s. 4, the remainderman became entitled to the estate:

Held, also, that the remainderman's estate was forfeited by reason of his non-compliance with the name and arms clause.

ROBERT THOMPSON, by his will, dated the 30th of December, 1781, devised all his freehold estates to Stamp Brooksbank and William Whately, and their heirs, to the following uses: viz., to the use of the said Stamp Brooksbank and William Whately, and their heirs, during the life of the testator's niece, Elizabeth Corbett the elder, the wife of Thomas Corbett, in trust for her, the said Elizabeth Corbett the elder, and her assigns, for her life for her sole and separate use; and from and after her decease to the use of William Corbett (eldest son of the said Elizabeth Corbett), and his assigns, for his life, with remainder to the use of trustees to preserve contingent remainders; with remainder to the use of the *first son of the body of William Corbett in [291 tail male; with remainder to the use of the second, third, fourth, fifth, and all and every other the son and sons of the body of the said William Corbett successively in tail male, with divers remainders over. And after a proviso enabling Elizabeth Corbett and the other tenants for life named in the will to grant leases for twenty-one years, the

testator declared his will and meaning to be that all and every the person and persons who should for the time being be, under and by virtue of that his will, entitled to the possession of his real estates for their own benefit after the decease of his said niece, Elizabeth Corbett, should, when and so soon as he or they should so become entitled in possession, and when and so soon as he or they should have attained the age of twenty-one years, take and use the surname and arms of Thompson, and from thenceforth at all times use such surname and arms, and use his and their best endeavors to obtain an act of Parliament or other lawful and sufficient license or authority for enabling and entitling him so to do. And in case any such person or persons should neglect or fail to take and use such surname and arms, or to obtain a proper and sufficient license and authority for that purpose for the space of twelve calendar months next after the time when he and they should so become entitled in possession to such estates, or next after the time when he or they should attain the age of twenty-one years, whichsoever of such times should last happen; or if he or they should at any time thereafter fail to use such surname or arms, then and in every such case the estate and interest of the person so failing of and in his said estates and the aforesaid powers (*sic*) consequential thereto, should cease, determine, and be absolutely void to all intents and purposes whatsoever; and the testator's said estates should immediately thereupon go over and belong in possession to the person who should be next in remainder under that his will, and be then *in esse*, in like manner as if the person so failing or neglecting was naturally dead, anything thereinbefore contained to the contrary notwithstanding. And the said testator devised all his copyhold estates to the same uses and for the same intents and purposes, and subject to the same charges, powers, provisos and conditions as were thereinbefore contained, specified and declared concerning his freehold estates (except as to the limitations to his 292] trustees for *the purpose of preserving contingent remainders), or as near thereto as the nature thereof would admit of.

Robert Thompson died in 1788. He was at the time of his death entitled to extensive freehold, and also to some copyhold, estates in the county of Essex.

William Corbett, the eldest son of Elizabeth Corbett, assumed the name of Thompson, and was thenceforth known as William Thompson Corbett. He had five sons, Thomas George Corbett, Robert Corbett (who died an infant and un-

married), Andrew Corbett, and two others, whom it is unnecessary to name.

In 1818 Elizabeth Corbett, William Thompson Corbett and Thomas George Corbett concurred in suffering a recovery of the freehold estates devised by the will of Robert Thompson, under which these estates became vested (subject to the prior life interests of Elizabeth Corbett and William Thompson Corbett, and to certain charges) in Thomas George Corbett in fee. The copyhold estates devised by Robert Thompson's will remained, however, unaffected by this recovery.

Elizabeth Corbett died in 1825, and William Thompson Corbett in 1832; and upon the death of the latter Thomas George Corbett entered into possession of the said freehold and copyhold estates. He did not assume the name of Thompson, and died in July, 1868, without ever having had any male issue, and having by his will devised his real estate to trustees upon certain trust. On his death the trustees of his will procured themselves to be admitted to the said copyhold estates.

Andrew Corbett, the third son of William Thompson Corbett, died in 1864, without having disentailed the said copyhold estates, and having had issue several sons. The eldest of these, Walter Andrew Corbett, had attained the age of twenty-one at his father's death. He was at the time of the death of Thomas George Corbett serving with his regiment in India. He had not assumed the name of Thompson, and knew nothing of his rights under the will of Robert Thompson until after June, 1870. Another son of Andrew Corbett, named Alfred George, was an infant at his father's death, and attained the age of twenty-one on the 16th of April, 1873, and on the 9th of April, 1874, he duly barred his estate tail in the copyholds.

*The present suit was instituted by a person inter- [293] ested under the will of Thomas George Corbett for administration, and by an order made in June, 1870, the trustees of that will were empowered to sell parts of the freehold and copyhold estates devised by the will of Robert Thompson. Upon the title being investigated, it was discovered that the estates tail created by Robert Thompson's will had not been barred as regards the copyholds, and it was assumed that the copyholds had become vested for an estate tail in Walter Andrew Corbett, who was accordingly admitted thereto in 1872. Upon this footing an agreement for the sale of part of the freeholds and copyholds was entered into under the sanction of the court and with the consent of Walter Andrew

Corbett; but afterwards doubts arose whether the aforesaid assumption was not erroneous, and whether, on the one hand, Thomas George Corbett had not gained a title to the copyhold estates by adverse possession, or, on the other hand, Walter Andrew Corbett had not forfeited his estate by non-compliance with the name and arms clause contained in the will of Robert Thompson.

It was arranged, by consent of all parties claiming any interest in the copyholds, that the question of the title to the purchase-money should be decided on a summons taken out by the plaintiff in the suit, calling on the purchaser to pay the whole of his purchase-money into court, and this summons now came on to be heard.

Mr. *Southgate*, Q.C., and Mr. *Cookson*, for the plaintiff: The name and arms clause applies to every person entitled in possession under the will of Robert Thompson. Thomas George Corbett ought to have complied with it within one year after he became entitled to the property; he did not do so, and by reason of such non-compliance the estate went over to Andrew Corbett, who was then of full age. He ought to have entered or brought his action for recovery of the land within twenty years after this time; for by 3 & 4 Will. 4, c. 27, s. 3, it is provided, that where the person claiming land, or the person through whom he claims, "shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition broken." *Andrew Corbett neither entered nor brought an action, and Thomas George Corbett consequently acquired a good title by adverse possession.

Mr. *Badcock*, for Walter Andrew Corbett: I do not admit that the name and arms clause applies to tenants in tail; but if it does, I say that sect. 3 of the statute 3 & 4 Will. 4, c. 27, on which the plaintiffs rely, is to be read in connection with sect. 4, which is as follows: "Provided always, that when any right to make an entry or distress or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened."

[The MASTER OF THE ROLLS: Must not the terms "forfeiture" and "breach of condition" be read in their strict legal meaning? Does the clause apply to a condition upon the happening of which an estate is to arise under a conditional limitation?]

I submit that these terms are to be read in their largest sense, and that the effect of the clause is to give the remainderman the whole duration of the particular estate and twenty years more, during which he may bring his action; *Sugden's Vendors and Purchasers* (').

Mr. *Southgate*, being called upon, declined to offer any further observations on this point.

SIR G. JESSEL, M.R.: I think I must hold that the effect of the statute is to give a remainderman the right to enter at the termination of the prior estate. I think that the true way of reading the statute is to *give the words "for- [295] forfeiture" and "breach of condition" their largest sense, and to make them apply whether the forfeiture gives a right to an estate under a conditional limitation or whether it is a true forfeiture at law, which can only be taken advantage of by the heir. I think, therefore, the true view of this case is, that whether the name and arms clause applied to Thomas George Corbett or not (on which point I will hear further argument), the Statute of Limitations cannot apply. If the name and arms clause did not apply to Thomas George Corbett, then, of course, there has been no forfeiture, and on the death of Thomas George Corbett, as he did not bar the entail and died without issue, the next remainderman, whoever he was, would be entitled to possession. If the clause did apply to Thomas George Corbett, then I hold that the title of the remainderman accrued by forfeiture or breach of condition within the meaning of the 4th section of the 3 & 4 Will. 4, c. 27; that those words include every case of forfeiture or breach of condition, whether the effect of the forfeiture was to accelerate another estate under what is sometimes called a conditional limitation, or whether the effect of the forfeiture was merely to give a right to the heir to re-enter under the old common law rule; and that this section was intended to apply to both those cases, and consequently the original right, if I may call it so, of the remainderman to enter on the expiration of the previous estate in the natural way, upon the death of the tenant for life, is not taken away by the tenant for life committing a forfeiture. To hold otherwise would have a very strange result. Take, for instance, the case of a clause of forfeiture and

(') 14th Ed., p. 480.

conditional limitation over by reason of the tenant for life not residing for six months every year at the mansion house,—a point which is exceedingly difficult to ascertain, because residence has been decided not to require that a man shall actually sleep there every night; then, if the tenant for life broke this condition and lived twenty years after, he would acquire a fee simple, unless the 4th section applies to such a case. I think that such a result would greatly surprise the remainderman, and it would really be too absurd. I must, therefore, read the 4th section in its widest sense, and hold that it applies to such conditional limitations as these as well as to other cases of forfeiture. 296] Consequently, I think that whoever *has a title the devisees under the will of Thomas George Corbett have not.

There still remains the question whether the clause applies to a tenant in tail or not.

Mr. *Badcock* contended that the clause did not apply to tenants in tail, citing *Corbet's Case* (*); *Jarman on Wills* (*).

He further contended that even if it did apply, still time did not begin to run against Walter Andrew Corbett until he had notice of the condition: *Doe v. Beauclerk* (*).

Mr. *Blakesley*, for Alfred George Corbett, cited *In re Hodges' Legacy* (*).

Mr. *Borrett*, for the purchaser, cited *Re Catt's Trusts* (*).

Mr. *Cadman Jones*, for the trustees of Thomas George Corbett's will.

SIR G. JESSEL, M.R., commented at considerable length on the clause in question, and came to the conclusion that although the testator had not expressed himself with perfect accuracy, the court was not prevented from giving effect to the plain direction that every person who should under the will be entitled to possession of his real estate, should do certain acts within a certain time, and in case of any person failing so to do, his estate and interest should cease and determine. His honor then continued:

I hold, therefore, that the clause does apply to a tenant in tail. I have already held that Walter Andrew Corbett, the next remainderman, became entitled in 1868, and as he was then twenty-one he would certainly forfeit unless the fact of his being ignorant of the will itself and of the condition will protect him.

Now, as to that, I think the case of *Porter v. Fry* (*) is a

(*) 1 Rep., 83 b.

(*) 3d Ed. vol. ii., p. 18.

(*) 11 East, 657.

(*) Law Rep., 16 Eq., 92.

(*) 2 H. & M., 46; 33 L. J. (Ch.), 495.

(*) 1 Vent., 199.

clear and distinct authority. In that case there was a devise to a lady in tail upon condition that if she married without consent the *estate would go over. She did marry [297 without consent, but she had no express notice of the devise, and it was contended for her that as she did not know of the devise, and did not know, therefore, of the condition, that she was entitled to say that she was not liable to the condition until she knew of it. However, the judges gave judgment against her on the ground that the testator had made no such exception. They said, if the person liable to the condition had been heir-at-law, and so could have entered under another title, believing himself to be in under his common law title, he was not to be ousted of that title without notice of the will. But where he was a stranger, that is, a person not heir-at-law, he being a stranger could only take the benefit of the devise under the will by complying with its terms; and if he did not know of the will, it was a great misfortune for him; but as want of knowledge had not been excepted by the testator himself, they could not make a will for him or make a new case of exception. When you come to look at this will you have a very good illustration of the force of these reasons, because the testator himself exempts persons not entitled to possession, and he exempts persons who are infants, but he has made no other exemption. The principle of that case of *Porter v. Fry* (*) was followed very recently in the case of *In re Hodges' Legacy* (*), where the legatee was in India, as Walter Andrew Corbett was here. The principle is, that a person who takes by gift under a will cannot plead want of knowledge of the contents of the will as an excuse for not complying with its provisions; and on that principle it appears to me that Mr. Badcock's client is not exempted from the operation of the clause, and consequently the money representing the estate which has been sold will belong to Mr. Blakesley's client, and I will make an order accordingly.

Solicitors: Messrs. *Frere & Co.*; Messrs. *White, Borrett & Co.*; Mr. *Deedes*; Messrs. *R. M. & F. Lowe*.

(*) 1 Vent., 199.

(*) Law Rep., 16 Eq., 92.

[Law Report, 18 Equity Cases, 301.]

M. R., May 26, 1874.

301]

*TURNER V. BUCK.

[1869 T. 60.]

Will—Legacy payable out of Proceeds of Sale of Real Estate—Interest on Legacy.

Devise of real estate upon trust for sale, and out of the proceeds of such sale to pay certain legacies:

Held, that interest on the legacies was payable from the period of a year after the testator's death.

Pearson v. Pearson (1), *Spurway v. Glynn* (2), and *Shirt v. Westby* (3) distinguished.

JOHN BESSEMERES, by his will, devised certain real estate to trustees upon trust for sale, and to stand possessed of the proceeds of such sale upon trust to pay thereout a legacy of £1,000 to his daughter, and a legacy of £1,000 to his son William Bessemeres (since deceased), and certain other legacies therein mentioned.

The suit was instituted for the administration of the testator's estate, and the question was raised, on further consideration, by the administrator of the deceased legatee, whether the legacies carried interest from the death of the testator.

Mr. Waller, Q. C., and Mr. Colt, for the plaintiff.

Mr. Southgate, Q. C., and Mr. Cust, for the testator's widow.

Mr. Cozens-Hardy for the administrator of William Bessemeres: The legacies are not payable out of the personal estate, but are solely charged on the real estate. The rule by which interest is calculated from the end of a year from the testator's death does not apply.

In *Pearson v. Pearson* (1), the rule was thus stated: "In 302] *the case of legacies charged upon lands only, where no day of payment is fixed, interest must be chargeable from the death of the testator."

In *Spurway v. Glynn* (2), where there was a devise upon trust by demise, sale, or mortgage, or by rents or profits, to raise and pay with all convenient speed the sum of £400, interest was decreed from the death of the testator.

In *Shirt v. Westby* (3) a charge by a will on real estate of simple contract debts of another person was considered as a legacy carrying interest from the death of the testator.

The same principle applies here, and interest must be calculated from the testator's death.

SIR G. JESSEL, M. R.: The cases referred to were all cases where legacies were charged upon, or directed to be raised

(1) 1 Sch. & Lef., 10.

(2) 9 Ves., 483.

(3) 16 Ves., 393.

and paid out of the rents and profits of real estate, or by mortgage, but there is no authority for applying the principle there adopted to the case of legacies payable out of the proceeds of the sale of real estate. Here the legatees can only claim interest from the period at which the sale of the real estate might reasonably have been effected. I am of opinion that a year from the testator's death is a reasonable period, and interest will accordingly be payable from that time.

Solicitors: Mr. A. Turner; Messrs. Flux & Leadbitter.

[Law Reports, 18 Equity Cases, 303.]

M.R., June 5, 1874.

*WHITE V. JAMESON.

[303]

[1873 W. 139.]

Injunction—Nuisance—Liability of Occupier of Land for Acts of his Licensee—Practice—Parties.

Where the occupier of lands grants a license to another to do certain acts on the land, and the licensee in doing them commits a nuisance, the occupier may be made a defendant to a suit to restrain the nuisance.

THE plaintiff was the owner of certain cottages situate on the north side of a street called Terrace Road in Widnes. This street was twenty-four feet wide. On the south side of it, opposite the cottages, was a ship-yard belonging to and occupied by the defendant William Jameson. On this yard a brick kiln was erected, within forty-five feet of the cottages, and was lighted. The suit was instituted against William Jameson and William Proffitt, to restrain the burning of the bricks so as to be a nuisance to the plaintiff's cottages and the occupiers thereof.

It appeared that the defendants had, in May, 1873, entered into an agreement in the following terms:

"I, William Proffitt, do hereby agree to excavate and take away all clay to the depth of ten feet or more, where required, from the ship-yard belonging to William Jameson. That is to say, all clay and soil to the depth of ten feet or more, where required, from under all sheds, offices, and smithy. I will excavate and take away any and all of it at my own cost. And in payment thereof will give to the said William Jameson one shilling and sixpence for every 1,000 bricks made therefrom. The said William Jameson to take as payment thereof as many good and well-burnt bricks to

the amount of 1s. 6d. for every 1,000. The same to be taken at a fair market value, weekly or otherwise.

"I, William Proffitt, do undertake to give the said William Jameson a correct account of all bricks made weekly, that he may take to the amount of his claim and thereby be paid for the said clay as the work proceeds."

304] *Soon after the agreement had been entered into, Proffitt erected and lighted the kiln in question.

By his answer, Jameson stated that he had authorized Proffitt to burn in the yard into bricks the clay found in the yard, but had reserved no power to direct when or how such burning should be carried on; and he denied that he had taken any active part in the erection of the kiln or burning of the bricks.

The cause now came on to be heard. The defendants both denied that any nuisance was ever committed or intended to be committed; but the court decided against them on that point. The defendant Jameson further contended that he was in no way liable for the acts of Proffitt, and ought not to have been made a party to the suit: and the present report is confined to that question.

Mr. Chitty, Q.C., and Mr. Kekewich, for the plaintiff.

Mr. Rigby, for the defendant Proffitt.

Mr. Southgate, Q.C., and Mr. Medd, for the defendant Jameson, contended that he ought not to have been made a party to the suit. The acts complained of were not done by Jameson but by Proffitt. It was true that Jameson had authorized Proffitt to burn bricks on the land, but he had not authorized him to commit a nuisance, and there were parts of the land on which bricks might be burnt without any nuisance to the plaintiff's cottages. Moreover, Jameson had not reserved to himself any right to control Proffitt, and the latter was therefore exclusively liable: *Rich v. Basterfield* (*).

Mr. Chitty referred to *Saxby v. Manchester, Sheffield, and Lincolnshire Railway Company* (*); *Rex v. Pedley* (*); *Todd v. Flight* (*).

SIR G. JESSEL, M.R., stated the facts, and decided that the burning of the bricks was a nuisance to the plaintiff's cottages, and continued:

I hold the defendant Jameson liable to be sued for the 305] acts *complained of. The land on which they were committed was his; and, independently of his having an in-

(¹) 4 C. B., 783.

(²) Law Rep., 4 C. P., 198.

(³) 1 A. & E., 822.

(⁴) 9 C. B. (N.S.), 377; 30 L. J. (C.P.),

21.

terest in the profits, the defendant Proffitt did these acts by his license. The law on this subject is laid down in *Laugher v. Pointer* (¹), a case which itself related to a very different matter. Mr. Justice Littledale there says: "The rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land and buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by the law to himself, and he should take care not to bring persons there who do any mischief to others." These observations are exactly in point, and have been cited with approbation in *Quarman v. Burnett* (²) and *Rich v. Basterfield* (³). Now here Jameson was in possession of the property, for he did not demise it to Proffitt, he merely granted to him a revocable license to burn bricks on it. Consequently he has brought Proffitt on his land and allowed him to commit a nuisance, and for this I hold he is liable to be sued in equity as well as at law.

His honor then commented on the defence set up by Proffitt, and made a decree for a perpetual injunction with costs against both defendants.

Solicitors: Messrs. *Gregory, Rowcliffes & Rawle*, agents for Mr. *W. H. Linaker, Runcorn*; Messrs. *Cole, Cole & Jackson*, agents for Messrs. *Davies & Brook, Warrington*; Messrs. *Young, Maples, Teesdale & Co.*, agents for Messrs. *Beasley & Oppenheim, Widnes*.

(¹) 5 B. & C., 547, 560.

(²) 6 M. & W., 499.

(³) 4 C. B., 788.

[Law Reports, 18 Equity Cases, 306.]

M.R., June 4, 5, 9, 1874.

*HONYWOOD V. HONYWOOD.

[306

[1862 H. 121.]

Tenant for Life and Remainderman—Waste—Timber—Thinnings—Property in Trees when cut down—Local Custom.

Although a tenant for life subject to impeachment for waste cannot cut timber at all (except periodically on a timber estate), or, as a general rule, trees which would become timber if they were of the age of twenty years or upwards, yet he may cut down timberlike trees under twenty years of age for the necessary purpose of pre-

serving or allowing the growth of other trees, and is entitled to the proceeds of such cuttings.

Where timber is cut down or blown down the property in it belongs to the owner of the first estate of inheritance.

Where the court orders timber to be cut for any reason, the proper course is for the proceeds to be invested, and the income given to the successive owners of the estate until there is an absolute estate of inheritance, the owner of which is entitled to the principal; and the same rule applies to cases of equitable waste.

A tenant for life is entitled at law to the proceeds of trees (not timber) cut by him, whether rightfully or wrongfully, though liable in the latter case to an action of waste; but, *semble*, equity would not allow him to retain the proceeds of wrongful cuttings.

Local custom as to timber observed upon.

WILLIAM PHILIP HONYWOOD by his will devised all his real estates to trustees, upon trust to manage the same, and, after certain payments therein mentioned, to pay the rents and profits to his wife during her life or widowhood, with remainders over.

The testator died in 1859, and the suit was instituted by Mrs. Honywood for the administration of his estate. Various inquiries had been directed by the decree, and orders had been made from time to time for felling part of the timber on the estate, and directing that some part of such felled timber might be used for repairs on the estate, and that the remainder might be sold, and the proceeds paid into court and invested, and the income thereof paid to the widow as tenant for life.

It appeared that part of the money thus paid into court represented the proceeds of the sale of trees, which, according to the evidence of the agent for the estate, were ripe and fit to be cut, and would not improve but lessen in value, and that it would be for the benefit of the estate if they were cut.

The question which came before the court, on further consideration of the suit, was, as between the plaintiff, as equitable tenant for life, and the remainderman, whether the proceeds of the sale of the trees, which were felled in the regular course of thinning, or which were fit to be cut, and would not improve by standing, and which were injurious to the other timber, belonged absolutely to the plaintiff, or whether she was only entitled to the income thereof when invested.

Mr. *Fischer*, Q.C., and Mr. *Hanson*, for the plaintiff: The plaintiff, as equitable tenant for life, subject to impeachment for waste, is entitled to the proceeds of the sale of timber cut periodically in the regular course of thinning, and also of those trees which would not improve by standing or which would injure the growth of other timber.

In *Earl Cowley v. Wellesley* (¹), part of a devised estate in Hampshire consisted of woodlands, where the underwood was cleared every year, and such trees were periodically cut down as were likely to obstruct the growth of other trees, and part of the estate in Wiltshire consisted of woodlands containing oak, ash, elm, Scotch fir, birch, and spruce trees, and underwood, and it had been considered desirable, in order to improve the growth of the woods, to fell a number of the trees of all these descriptions for the purpose of improving the growth of the remaining trees; in that case Lord Romilly held that the money produced by the sale of timber on the Hampshire estate, where it had been cut in the regular course of thinning, should be treated as income, and that the money produced by the sale of timber on the Wiltshire estate should be treated as capital, except where it had been cut in the regular course of thinning.

[SIR G. JESSEL, M.R., said that he had sent for the special case in *Cowley v. Wellesley*, and it appeared that the thinnings on the *Wiltshire estate were young plantations, [308 and not properly timber at all.]

In *Bagot v. Bagot* (²) Lord Romilly observed: "It does not follow that all cutting of timber is waste. In many places oak coppice is felled regularly every sixteen or eighteen years, leaving poles which are regularly cut every second fall, i.e., every thirty-two or thirty-six years. This timber would, I apprehend, constitute the fair profits of the land, to which the tenant for life would be entitled. So also, I apprehend that proper and regular thinning of a wood for the purpose of improving the rest of the trees within certain limits would not amount to a waste."

[SIR G. JESSEL, M.R.: Those observations apply to what is known as a timber estate.]

In *Pidgeley v. Rawling* (³) it was held that the thinnings of fir trees under twenty years of age belonged to the tenant for life.

In *Bateman v. Hotchkin* (⁴) a tenant for life, impeachable for waste, was held entitled to have the benefit of the sale of all such trees felled by the wind as he would be entitled to cut himself, and to all fair and proper thinnings, and to all coppices cut periodically in the nature of crops.

The subject of timber trees, and what trees are considered timber in different parts of the country, is treated of in *Cruise's Digest* (⁵), and is also discussed in *Bullen v. Den-*

(¹) Law Rep., 1 Eq., 656.

(⁴) 31 Beav., 486.

(²) 32 Beav., 509, 517.

(³) Vol. i. p. 116.

(⁵) 2 Coll., 275.

ning⁽¹⁾. In *Kerr* on Injunctions⁽²⁾ the rule is thus stated: "It is not waste to cut down trees which are not timber either by law or custom, or from the situation in which they are placed, unless some special prejudice arises thereby to the inheritance. Nor is the proper and regular thinning of a wood for the purpose of improving the rest of the trees waste, provided it is done in a reasonable and husbandlike manner."

SIR G. JESSEL, M.R.: It is settled law that a tenant for life, impeachable for waste, may cut timberlike trees under 309] twenty *years of age for the necessary purpose of preserving or allowing the growth of other trees.

Mr. *Southgate*, Q.C., and Mr. *Freeling*, for the trustees of the will, and Mr. *Crossley*, for the heir-at-law, were not called on.

June 5. SIR G. JESSEL, M.R.: As I understand the law, it is this: The tenant for life may not cut timber. The question of what timber is depends, first, on general law, that is, the law of England; and, secondly, on the special custom of a locality.

By the general law of England, oak, ash, and elm are timber, provided they are of the age of twenty years and upwards, provided also they are not so old as not to have a reasonable quantity of useable wood in them, sufficient, according to a text writer⁽³⁾, to make a good post. Timber, that is, the kind of tree which may be called timber, may be varied by local custom. There is what is called the custom of the country, that is, of a particular county or division of a county, and it varies in two ways. First of all, you may have trees called timber by the custom of the country—beech in some counties, hornbeam in others, and even white-thorn and black-thorn, and many other trees, are considered timber in peculiar localities—in addition to the ordinary timber trees. Then again, in certain localities, arising probably from the nature of the soil, trees of even twenty years old are not necessarily timber, but may go to twenty-four years, or even to a later period, I suppose, if necessary; and in other places the test of when a tree becomes timber is not its age but its girth. These, however, are special customs. Once arrive at the fact what is timber, the tenant for life, impeachable for waste, cannot cut it down. That I take to be the clear law, with one single exception, which has been established principally by modern authorities in favor of the

(1) 5 B. & C., 842.

(2) Page 240.

(3) See *Gibbons* on Dilapidations, page 63 b.

215; *Countess of Cumberland's Case*.

Moore, 812; *Herlakenden's Case*, 4 Rep.,

owners of timber estates, that is, estates which are cultivated *merely for the produce of saleable timber, and where [310 the timber is cut periodically. The reason of the distinction is this, that as cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land, and in these cases the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate, and, therefore, goes to the tenant for life. With that exception, I take it a tenant for life cannot cut timber; therefore, I hold in this case, it not being a timber estate, that the tenant for life cannot cut timber at all.

The next question to be decided is, what can the tenant for life cut? The tenant for life can cut all that is not timber, with certain exceptions. He cannot cut ornamental trees, and he cannot destroy "germins," as the old law calls them, or stools of underwood; and he cannot destroy trees planted for the protection of banks, and various exceptions of that kind; but, with those exceptions, which are waste, he may cut all trees which are not timber, with again an exception, that he must not cut those trees which, being under twenty years of age, are not timber, but which would be timber if they were over twenty years of age. If he cuts them down, he commits waste, as he prevents the growth of the timber. Then, again, there is a qualification that he may cut down oak, ash, and elm, under twenty years of age, provided they are cut down for the purpose of allowing the proper development and growth of other timber that is in the same wood or plantation. That is not waste; in fact, it is for the improvement of the estate, and not the destruction of it, and therefore he is allowed to cut them down. If, therefore, in the course of the proper management of this estate, any oaks, ashes, and elms under twenty years old have been cut down for the purpose of allowing of the growth of the other timber in a proper manner, that would not be waste on the part of the tenant for life, though impeachable for waste.

Then the only other question to be decided is, in whom is the property of the timber cut down vested? There, I think, the law *is reasonably clear. If the timber is timber [311 properly so called, that is, oak, ash, and elm over twenty years old (I am not saying anything about exceptional cases), the property in the timber cut down, either by the tenant for life or anybody else, or blown down by a storm, belongs at

law to the owner of the first vested estate of inheritance. There is in equity an exception where the remainderman, the owner of the first vested estate of inheritance, has colluded with the tenant for life, to induce the tenant for life to cut down timber, and then equity interferes and will not allow him to get the benefit of his own wrong. There is, again, a second equitable exception, and that is this: that where timber is decaying, or for any special reason it is proper to cut it down, and the tenant for life in a suit properly constituted, to which the remainderman or the owner of the vested estate of inheritance is a party, gets an order of the court to have it cut down, there the court disposes of the proceeds on equitable principles, and makes them follow the interests in the estate. In that case, therefore, the proceeds are invested, and the income given to the successive owners of the estate, until you get to the owner of the first absolute estate of inheritance, who can take away the money.

The same course, as I understand it—(there is a decision of Lord Lyndhurst, in *Ormond v. Kynnersley* ⁽¹⁾), the other way, but modern decisions have settled the law)—is adopted in the case of the commission of equitable waste, that is, where ornamental trees, or trees which could not otherwise be cut down even by a tenant for life unimpeachable for waste, are cut down; there also, as I understand it, the proceeds are invested so as to follow the uses of the settlement, that is, to go along with the estate according to the settlement giving the income to the tenant for life, and so on.

Then we come to the property in trees not timber, that is, those which are not timber either from their nature or because they are not old enough or because they are too old. In all those cases, I take it, the property is in the tenant for life. If he cuts them down wrongfully, and commits waste, 312] the property is still in him, *though he has committed a wrong, and would be liable to an action in the nature of waste. I am not sure that would follow in equity. My impression is that equity would say that he should not be allowed to take the benefit of his own wrong, and that he should not be allowed to take the property in those trees he cuts down. This is not the case at common law, and I am not aware that the exact point has been decided in equity.

If the present tenant for life has cut down oak, ash or elm under twenty years of age, in a due course of cultivation, and for the purpose of improving the growth or allowing the development of timber trees, she will be entitled to the proceeds of the trees, so cut down; and assuming, when I come

(¹) 7 L. J. (Ch.), 150.

to look at the affidavits, that there are some which show that there is such a class of tree cut down, as I understand is actually the case, then I shall direct an inquiry to ascertain what portion of the proceeds she is entitled to.

As regards the future, I think I have said enough, without any further declaration, to show what the tenant for life will be entitled to.

June 9. The case was again mentioned, and it appearing that the plaintiff waived any inquiry as to the proceeds of thinnings cut in time past, and was content to receive the dividends of the funds standing to the timber account, a declaration was made of the rights of the parties as to any future cuttings according to the judgment.

Solicitors: Messrs. *Frere & Co.*; Messrs. *M. & F. Davidson*; Messrs. *Beaumont & Warren*.

It has been held, but we doubt the soundness of the decision except where the property was evidently let to be so used, that a lessee for years who cuts down willows, leaving the butts from which they will shoot afresh, is not guilty of waste unless they were a shelter to the house or a support to the bank of a stream: *Phillips v. Smith*, 14 Mees. & Welsb., 589. A tenant with the privilege of cutting firewood or fencing timber cannot obtain his firewood or fencing materials elsewhere, and then cut as much timber from the demised premises: *Clarke v. Cummings*, 5 Barb., 340; *Attorney-General v. Stowell*, 2 Anst., 596, 601; *Gower v. Eyre*, Geo. Cooper's Chy. Rep., 156; *Vandusen v. Young*, 29 N. Y., 10. But see *Sarles v. Sarles*, 3 Sandf. Chy., 601.

But the tenant may not only cut firewood for his own house but also for that of his servant who cultivates the land, provided it can be done without injury to the inheritance: *Garner v. Derring*, 1 Paige, 573; unless there be a scanty supply of timber: *Sarles v. Sarles*, 3 Sandf. Chy., 601.

See Taylor's Landlord and Tenant, §§ 351-356; Waterman's Eden on Injunctions, tit. Waste, particularly vol. 2, p. 181, note 1; Kerr on Injunctions, 1st Am. ed., 239-245; and Mr. Bishop's recent and very excellent work on Equity, tit. Waste.

It has been held in Maryland that a court of equity will not grant an injunction to restrain a party from cutting down trees, it appearing that they

have no peculiar value, and that adequate compensation for their destruction, could be obtained by an action at law: *Powell v. Rawlins*, 83 Md., 239.

But it seems to us the case should not be followed elsewhere. The difficulty in adequately compensating the owner for the value of trees cut in the settled portion of our country must be apparent: *Stanford v. Hurlstone*, 8 Eng. Rep., 775.

When a dwelling-house, with grounds and ornamental water, were demised together, with the control of a plantation (which was on the opposite side of the ornamental water, and belonged to the lessor, but was not demised to the lessee), for the purpose of preventing trespassers thereon, but so as not to interfere with the persons employed by the lessors, his heirs or assigns. The lease referred to a plan on which the plantation was represented. Held, that on the construction of the lease as explained by the plan, the lessor was not at liberty during the term to destroy the plantation, and an injunction was granted to restrain him from so doing: *Nicholson v. Rowe*, 4 De Gex & Jones, 10, cases cited by Mr. Perkins in note to Little, Brown & Co's ed.

In a case of sufficient importance, the cutting of line trees will be restrained by injunction: *Relyea v. Beaver*, 34 Barb., 547, affirmed 25 N. Y., 123.

But an action will not lie to restrain the owner of lands bordering on a lake from planting trees so as to obstruct his neighbor's view of the lake: *Ledyard v. Ten Eyck*, 36 Barb., 102.

[Law Reports, 18 Equity Cases, §13.]

M.R., June 10, 1874.

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*ACKROYD V. ACKROYD.

[1859 A. 56.]

Hotchpot—Payments on account of Shares in Residuary Estate—Devastavit—Loss and partial recovery of Assets—Interest.

A testator gave to several of his eight children real estates, and bequeathed his residuary personal estate to all the eight, with a direction that their portions should be equal, and to that end that those of them to whom he had given the real estates should respectively take them on account of their shares at the estimated values mentioned in his will. The executor absconded with the personal estate in his hands, but after many years a considerable part of it was recovered:

Held, that the amount recovered must be treated as consisting of a principal sum, with interest thereon at £4 per cent. per annum from the testator's death; that the devisees of the real estates must bring into account their estimated values as part of the principal; and that, the shares of principal having been thus ascertained, the part apportioned as interest must be divided between them in proportion to those shares.

THE question in this case was whether certain sums which were to be brought into hotchpot were to be brought in with interest.

The testator, Thomas Ackroyd, by will made in 1854, devised and bequeathed to several of his children certain real and personal estates, which he stated that he valued at the sums therein mentioned, and he further stated he had advanced to certain of his children whom he named the amounts of money which he mentioned. He then bequeathed his residuary personal estate to trustees on trust for conversion, and directed that the proceeds should be held in trust for his eight children therein named. He went on to direct that the shares or fortunes of his children should be equal, or as nearly so as might be, and to that end that the real and personal estate thereby devised and bequeathed to some of them, and the provision already made in real or personal estate by him for some of them, as thereinbefore mentioned, should be taken by them respectively on account of their shares or fortunes under that his will at the amounts or prices thereinbefore named and estimated by him as the value thereof.

The testator died in 1854, and in 1859 a decree was made 3[14] at *the suit of three of the residuary legatees for the administration of his estate. Shortly afterwards the principal acting executor and trustee absconded to America, indebted to the estate in upwards of £10,000, and never

returned. The greater part of this sum was, after long delay, recovered by enforcing the orders of the court against his property, and the suit now came on upon second further consideration that the funds in court might be distributed.

The principal question now was how the sums directed by the testator to be brought into account were to be brought in. The surviving plaintiffs contended that, in distributing the fund in court, the parties who had received those sums must bring them into hotchpot, with interest at £4 per cent. from the death of the testator. The defendants contended that they were to be brought in without interest.

Mr. *Southgate*, Q.C., and Mr. *Cadman Jones*, for the surviving plaintiff.

Mr. *Chitty*, Q.C., and Mr. *Hanson*, for the defendants, referred to *Cox v. Cox* (').

THE MASTER OF THE ROLLS held that the sums recovered from the defaulting executor must be considered as consisting of a principal sum with interest thereon at £4 per cent. per annum from the death of the testator, and that the sums directed by the testator to be brought into account must be brought into hotchpot as part of the principal sum. The shares of principal which the legatees were entitled to receive being thus ascertained, that part of the sum recovered which was attributable to interest would be divided among them in proportion to their shares in the principal.

Solicitors: Messrs. *Field, Roscoe & Co.*; Messrs. *Paterson, Snow & Burney*.

(') 1 Law Rep., 8 Eq., 343.

[Law Reports, 18 Equity Cases, 315.]

M.R., June 12, 1874.

*STRONG V. BIRD.

[315

[1871 S. 92.]

Debt—Appointment of Debtor as Executor—Intention to forgive Debt—Incomplete Gift—Release.

B. borrowed £1,100 from his step-mother, who lived in his house, paying £212 10s. a quarter for board; and it was agreed that the debt should be paid off by a deduction of £100 from each quarter's payment. Deductions of this amount were made for two quarters, but on the third quarter-day the creditor refused to make any further deduction, and paid the full amount of £212 10s., and continued down to the time of her death (which took place more than four years afterwards) to pay to B. the like quarterly sum. B. was appointed sole executor of his step-mother, and proved the will: and a suit for administration was instituted:

Held, that the debt was gone: first, because the appointment of B. as executor released the debt at law, and any claim in equity was rebutted by evidence of a con-

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Strong v. Bird.

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tinuing intention on the part of the testatrix to give; and, secondly, because the intention of the testatrix to give B. the sum of £900 was completed by nine quarterly payments of £212 10s. each.

THIS was a suit instituted by one of the next of kin of Frances Bird, widow, who died in December, 1870, having made a will containing an appointment of the defendant as executor, but no disposition of her residuary personal estate. The question which now came before the court on an adjourned summons was, whether the defendant was to be charged with a debt of £900, alleged to be due from him to the estate.

It appeared that the testatrix was the step-mother of the defendant. She had married his father when the defendant was only three years old, and had no children of her own, and had always shown the greatest affection for the defendant, and after she became a widow, and for several years previously to her death, she resided with the defendant and his wife. She had an annual income of £2,000, and paid to the defendant a sum of £212 10s. per quarter for her board and lodging. In 1866 the defendant borrowed of her the sum of £1,100, and it was agreed that this loan should be paid off by a deduction of £100 from each quarter's payment for board. Accordingly, deductions of this amount were made from the quarterly payments made by the testatrix in June* and October, 1866. At Christmas, 1866, according to the evidence of the defendant and his wife, a conversation took place between them and the testatrix, in the course of which the testatrix stated that she did not want to have any more of the money lent returned, and she thereupon drew and gave to the defendant a check for the full quarterly payment of £212 10s., and she continued down to the time of her death to pay to the defendant the like quarterly sum. The evidence of the defendant and his wife was corroborated by memoranda in the handwriting of the testatrix on the counterfoils of the checks drawn by her.

The chief clerk found by his certificate that the defendant remained liable for the debt, and thereupon the defendant took out a summons to vary the certificate, which now came on to be heard.

Mr. Southgate, Q.C., and Mr. G. Miller, for the defendant, contended that, under the circumstances, the debt had been effectually released in equity: *Flower v. Marten* (').

Mr. Chitty, Q.C., and Mr. Jolliffe, for the plaintiff: The transaction amounted at most to an attempt to make a gift which has not been perfectly carried out. The debt

(') 2 My. & Cr., 459.

was not released at law: it is a case of accord without satisfaction. Neither is there any release in equity; for a mere voluntary declaration of intention, not being under seal, has no greater operation in equity than it has at law: *Cross v. Sprigg* ⁽¹⁾; *Peace v. Hains* ⁽²⁾. There are, it is true, cases in which a debt has been held to be released in equity, although no legal release had been executed, as, for example, *Yeomans v. Williams* ⁽³⁾ and *Taylor v. Manners* ⁽⁴⁾; but in all of them the creditor had induced the debtor to alter his position on the faith of a promise not to enforce the debt. That was also the ground of the decision in *Flower v. Marten*. Here there is nothing of the kind. In order to bring himself within the authority of these cases, the defendant ought, before the death of the testatrix, to have been in a position to obtain an injunction to restrain her from enforcing the debt; and it is submitted that he never was in such a position. It is clear that the *appointment of [317 the debtor as executor did not operate in equity as a release: *Ingle v. Richards* ⁽⁵⁾.

Mr. Mackeson, Q.C., Mr. Mander, and Mr. A. Thomson, for other parties.

SIR G. JESSEL, M.R.: Notwithstanding the arguments which have been submitted and the cases which have been cited, I think I can do justice in this case, which appears to be as fair and honest a case as was ever submitted to a court.

The facts are these: The defendant in 1866 borrowed £1,100 from a lady who was his step-mother, and evidently entertained towards him all the feelings of a mother. She lived in the defendant's house, and being possessed of a large income, appears to have allowed him £850 a year; payable by quarterly instalments, for her maintenance. The agreement as to the loan was that it should be paid off by a deduction of £100 from each quarter's payment for board; and in pursuance of this arrangement she deducted £100 in June and also in October, 1866, after which time, according to the defendant's evidence, she refused to make any further deductions, and expressly forgave him the debt. If it stood on that alone, I think the rule of the court would prevent me from acting on that evidence; but the defendant's evidence is corroborated by his wife, and also by memoranda on the counterfoils of the checks drawn by the testatrix. [His honor then read the material passages from the wife's affidavit, and continued:—] It appears that she

⁽¹⁾ 6 Hare, 552.

⁽²⁾ 11 Hare, 151.

⁽³⁾ Law Rep., 1 Eq., 184.

⁽⁴⁾ Law Rep., 1 Ch., 48.

⁽⁵⁾ 28 Beav., 366.

lived for four years after Christmas, 1866, and paid sixteen quarters' board at the rate of £212 10s.

Upon these facts, I consider it to be clear that whether Mrs. Bird did or did not give in law, she intended to do so. The question is, Did the law allow her to make this a complete gift without doing more than she actually did?

First of all, it is said, and said quite accurately, that the mere saying by a creditor to a debtor, "I forgive you the debt," will not operate as a release at law. It is what the law calls *nudum pactum*, a promise made without an actual [318] consideration passing, *and which consequently cannot be supported as a contract. It is not a release, because it is not under seal. Therefore the mere circumstance of saying, "I will forgive you," will not do. There are, however, two modes in which, as it appears to me, the validity of this transaction can be supported. First of all, we must consider what the law requires. The law requires nothing more than this, that in a case where the thing which is the subject of donation is transferable or releasable at law, the legal transfer or release shall take place. The gift is not perfect until what has been generally called a change of the property at law has taken place. Allowing that rule to operate to its full extent, what occurred was this: The donor, or the alleged donor, had made her will, and by that will had appointed Mr. Bird, the alleged donee, executor. After her death he proved the will, and the legal effect of that was to release the debt in law, and therefore the condition which is required, namely, that the release shall be perfect at law, was complied with by the testatrix making him executor. It is not necessary that the legal change shall knowingly be made by the donor with a view to carry out the gift. It may be made for another purpose; but if the gift is clear, and there is to be no recall of the gift, and no intention to recall it, so that the person who executes the legal instrument does not intend to invest the person taking upon himself the legal ownership with any other character, there is no reason why the legal instrument should not have its legal effect. For instance, suppose this occurred, that a person made a memorandum on the title deeds of an estate to this effect: "I give Blackacre to A. B.," and afterwards conveyed that estate to A. B. by a general description, not intending in any way to change the previous gift, would there be any equity to make the person who had so obtained the legal estate a trustee for the donor? The answer would be that there is no resulting trust; that is rebutted by showing that the person who conveyed did not intend the person

taking the conveyance to be a trustee, and although the person conveying actually thought that that was not one of the estates conveyed, because that person thought that he had well given the estate before, still the estate would pass at law, notwithstanding that idea, and there being no intention to revoke the gift, surely it would get rid of any resulting trust. On the same principle, when a testator makes his debtor executor, and thereby *releases the debt at [319 law, he is no longer liable at law. It is said that he would be liable in this court: and so he would, unless he could show some reason for not being made liable. Then what does he show here? Why, he proves to the satisfaction of the court a continuing intention to give; and it appears to me that there being the continuing intention to give, and there being a legal act which transferred the ownership or released the obligation—for it is the same thing—the transaction is perfected, and he does not want the aid of a court of equity to carry it out, or to make it complete, because it is complete already, and there is no equity against him to take the property away from him.

On that ground I shall hold that this gentleman had a perfect title to the £900; but there is another ground which I think is equally clear, namely, the testatrix living for more than nine quarters after the period when she forgave the debt, and paying the full amount for board, without any deduction.

Now, what were her legal rights? By the bargain that was made her legal right was to retain £100 every quarter out of the quarterly amount payable for board. It was not a question of set-off, but it was a legal debt. She, therefore, when the quarter expired, owed this gentleman £112 10s. and no more, and if he had brought an action for more, she could, by paying the £112 10s. into court, without any plea of set-off, have succeeded in the action. His legal right was to obtain from her at the end of each quarter £112 10s. At the end of each quarter she pays him another £100 which she does not owe him, and when she has made nine of those payments she has paid him £900. It is not any question of intended gift; it is a complete payment by her paying the £900 by instalments of £100 each, which she intended to give him, and which she has given him at each period as they became due by actual payments, and I think that that would enable him to say, "Having been paid, I have a right to retain, because the testatrix intended me to retain," and the gift is perfectly established in that way also.

On both grounds, therefore, I think that this gentleman is entitled to succeed, and I shall allow the summons accordingly.

Solicitors: Messrs. *Mason & Withall*; Messrs. *Chapple & Welch*; Mr. *Farrar*; Mr. *C. J. Mander*.

[Law Reports, 18 Equity Cases, 320.]

V.-C.M., June 2, 3, 1874.

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*PAINE V. JONES.

[1871 P. 141.]

Will before Wills Act—General Devise to Trustees—After-acquired Real Estate—Statute of Limitations—Adverse Possession by Trustee.

A testator, by a will dated in 1824, devised all his real and personal estate, and also all other his estate and effects of which he might be possessed at the time of his decease, to his wife and another trustee, in trust to pay the rents to his wife for life, with remainders over. The testator purchased a freehold estate after the date of his will. On his death, his widow (the other trustee having disclaimed) became sole trustee of his will, and entered into possession of the after-acquired property, as well as the devised estate, believing that all the property passed by the will. She continued in possession for more than twenty years, and then, being informed that she had acquired a title by adverse possession, she sold the estate to a purchaser for value:

Held, upon bill filed by the remainderman under the will to oust the purchaser, that the tenant for life had acquired a good title by adverse possession against the remainderman, and the bill was dismissed.

Board v. Board (!) distinguished.

WILLIAM NICOLL, by his will, dated the 12th of April, 1824, devised all his freehold and copyhold estates, and also all other his estate and effects, whatsoever and wheresoever, and of what nature and kind soever, of which he might be possessed at the time of his decease, to his wife, Charlotte Nicoll, and Thomas Harrison, and their heirs, executors, administrators and assigns, upon trust to pay the rents and profits to Charlotte Nicoll during her life, for her separate use, and after her death to pay the said rents and profits to his niece, Ann Hasler, for her life, for her separate use, and after her death to convey the same freehold and copyhold estates to the children of Ann Hasler, as tenants in common, in fee.

On the 9th of September, 1824, the testator purchased, for the sum of £600, a small freehold estate, which was conveyed to him to the ordinary uses to bar dower.

The testator died on the 20th of December, 1830, leaving his nephew, Thomas Nicoll, his heir-at-law.

Thomas Harrison disclaimed the trusts of the will, and

(!) Law Rep., 9 Q. B., 48.

Chatlotte *Nicoll, who alone proved the will, entered into possession of all the testator's real estate, including that acquired by him subsequently to the date of the will. [321]

Ann Hasler intermarried with the defendant William Paine, and had issue seven children, of whom the plaintiff was one, the other children being defendants.

In 1852 the children of Ann Paine instituted a suit of *Paine v. Nicoll* against Charlotte Nicoll, praying administration of the trusts of the testator's will and for the appointment of new trustees. Charlotte Nicoll put in an answer, by which she admitted that the after-acquired real estate of the testator was subject to the trusts of the will. After the filing of the answer, an arrangement was made for putting an end to the suit, and by an order dated the 4th of December, 1852, Charles Brown was appointed a trustee of the will jointly with Charlotte Nicoll, and she was ordered to convey all the real estate of the testator to the use of herself and such new trustee upon the trusts of the will.

In the preparation of the conveyance necessary to carry this order into effect, it was for the first time discovered that the after-acquired real estate of the testator did not pass by the will, and Charlotte Nicoll, upon being informed of this, refused to convey the same; and, by an order dated the 26th of February, 1853, made on the petition of the plaintiffs in the suit, it was ordered that Charlotte Nicoll should convey only the property which passed by the will.

Some time after the presentation of the said petition, an application was made to Thomas Nicoll, the heir of the testator, which resulted in an indenture being prepared, dated the 14th of March, 1854, by which Thomas Nicoll conveyed all his interest in the after-acquired freehold of the testator to the trustees of William Nicoll's will, to be held by them upon the trusts declared thereby. This indenture was executed only by Thomas Nicoll, William Paine and Ann his wife, and Charles Brown; but Charlotte Nicoll, the widow, though made a party to the deed, never executed it.

On the 3d of August, 1853, Charlotte Nicoll, who claimed to have acquired the fee simple of the after-acquired property by adverse possession, conveyed the reversion therein expectant on her own life to one Jones, in fee, for valuable consideration.

*Charlotte Nicoll died in 1858. In 1860, Jones, [322] for valuable consideration, conveyed one moiety of the prop-

erty to Johnston, who had acted as solicitor for Charlotte Nicoll in the suit.

Ann Paine (formerly Hasler) died in 1868. In 1869, Jones and Johnston sold the property to a Miss Sandford, and in the beginning of the following year she sold and conveyed the property to Thomas Salter, who died shortly afterwards, having devised it to Rebecca Salter and George Ridding, upon certain trusts.

In 1871 this bill was filed, alleging that the property was subject to the trusts of the will of the testator, and that Jones, Johnston, Sandford and Salter purchased with notice that such was the case; and praying that they or their representatives might be ordered to convey the property to the present trustees of the testator's will, and might account for the mesne profits.

The cause now came on to be heard.

Mr. *W. Pearson*, Q.C., and Mr. *Warmington*, for the plaintiff: We contend that Charlotte Nicoll, the widow of the testator, by entering into possession of the after-acquired property, and dealing with it as part of the property devised to her for life under the will, was estopped from denying that it passed by the will. It is admitted that this was the view taken of the will by all parties. The suit of *Paine v. Nicoll* was instituted in 1852 upon that understanding, and Mrs. Nicoll put in an answer to the suit admitting that she had taken possession of the after-acquired property, believing that it did pass by the will. It was not till after she had put in this answer that the mistake was discovered, and it was found out that, as the testator died before the passing of the Wills Act, the property purchased after the date of the will did not pass. The devise in the will is of "all other his estate and effects whatsoever and wheresoever, and of what nature or kind soever, of which he might be possessed at the time of his decease." These words are so extensive that it was natural that persons not learned in the law should have supposed that all the property of which the testator was possessed at the time of his decease did actually pass. But the widow had, in fact, no title except under the will, and she entered under the will and acquired a possessory title of more than twenty years, which was good 323] as against the *heir of the testator, but was not good as against the remaindermen under the will. She was the sole trustee, and she must be considered as constituting herself a trustee for those persons entitled after her decease to the residue of the testator's property. This case is similar

in all respects to *Board v. Board* ⁽¹⁾, where the tenant for life under the will of a testator entered into possession of the property purported to be devised to her by the will, amongst which was property of which the testator was only tenant by the curtesy, and had therefore no right to devise. She remained in possession for more than twenty years, and thereby acquired a good title as against the heir; but it was held that the tenant for life having entered under the will, those claiming through her were estopped, as against all those in remainder, from disputing the validity of the will. Mr. Justice Mellor observed that the tenant for life having accepted the estate under the will, treating it as a perfectly valid will, could not defeat the title of the remainderman under the will by alleging that the deviser had no title; and Mr. Justice Quain said: "I decide this case on the simple point that a person who takes under a will and acts on the will in paying the legacies and annuities given under it, cannot afterwards turn round and place himself in a different position, and maintain that he is in a position adversely to those who take under the same will." So it was held in *Asher v. Whitlock* ⁽²⁾. There the widow had wrongful possession of the estate, but coming in under the will she could not dispute the validity of the will. In *Anstee v. Nelms* ⁽³⁾ it was laid down by Chief Baron Pollock and Baron Martin, that if a person to whom a particular estate is given by will for his life takes possession, and is allowed to keep, as part of that estate, something not strictly belonging to it, he cannot set up a title as gained by adverse possession against the remainderman. The same principle was supported in *Hawksbee v. Hawksbee* ⁽⁴⁾, where it was held that a person entering into possession of property under a particular instrument, not being entitled under that instrument, entered as trustee for all the persons who were entitled under the instrument. The widow in this case admitted by her answer that she was in possession under the will, she was therefore [324] trustee for the persons entitled under the trusts of the will, and she and every one claiming under her is estopped from saying that the property did not pass by the will.

They also contended that the purchasers from Charlotte Nicoll all took with notice, or, at all events, that Jones and Johnston did so, and that the last named defendants were consequently liable to make good the value of the property to the *cestuis que trust*. It is, however, unnecessary to report the argument on these points.

⁽¹⁾ Law Rep., 9 Q. B., 48, 54.

⁽²⁾ Ibid., 1 Q. B., 1.

⁽³⁾ 1 H. & N., 225.

⁽⁴⁾ 11 Hare, 225, 230.

Mr. *Cotton*, Q.C., and Mr. *W. Barber*, for Messrs. Jones and Johnston: The whole question is *res adjudicata*. The order made in the suit of *Paine v. Nicoll* on the 26th of February, 1853, was clearly meant to exempt Charlotte Nicoll from conveying the after-acquired freeholds of the testator; but if Charlotte Nicoll had been in the position of trustee of that property, or estopped from denying that it passed by the will, that order would have been wrong, and she ought to have been ordered to convey the after-acquired freeholds as well as the other property of the testator. But on the law of the case that order was quite right. The will of the testator did not purport to pass any interest in the property now sought to be recovered; and this circumstance distinguishes the case from all those which have been cited.

[They were stopped.]

Mr. *Glasse*, Q.C., and Mr. *Graham Hastings*, for Salter. Mr. *Stirling*, for Miss Sandford.

Mr. *E. B. Cooper*, for the trustees of the will.

The VICE-CHANCELLOR: I do not call upon counsel for Salter and Miss Sandford, as I hold that they were purchasers for value without notice.

Mr. *Pearson*, in reply, upon the question whether the property was subject to the trusts of the will.

SIR R. MALINS, V.C.: This is a most unfortunate litigation about a very small property. The question arises under the 325] will of William Nicoll, which is *dated the 12th of April, 1824, at a time when the state of the law was, that however clearly a testator might have expressed his intention that he meant to pass after-acquired property, it did not operate so as to effectuate his intention. That is not the state of the law now, but I am bound to construe the will by the law as it stood at the time the will was made. The testator gives all his freehold and copyhold estates, and also all other his estate and effects whatsoever and wheresoever, and of what nature and kind soever, of which he might be possessed at the time of his decease. Those words must be read as meaning all the estate I now have, and which I may continue to have at my death. Then, after making his will, on the 9th of December, 1824, a deed was executed by which the testator had conveyed to him to uses to bar dower the property now in dispute—property worth from £400 to £600. He died on the 20th of December, 1830, and his widow survived him. The will, then, is governed by the state of the law before the Wills Act; but the widow, finding, as she did, that the testator had devised all his property which he

might be possessed of at the time of his decease, and considering that she was entitled under the will to the property he purchased after the date of the will, entered into possession of it. But it happened that she had no title whatever to this property, and could not take it under the will. Who, then, was entitled? There can be no doubt that the heir-at-law was the only person entitled, and if he had brought an action of ejectment he would certainly have recovered against the widow; but he was bound to bring his action within twenty years, unless he had been under disability, and then he would have had ten years longer in some cases, and twenty years in others. It is not suggested, however, that he was under any disability; therefore, in the year 1853, the heir-at-law was absolutely barred, and the widow, either in her own right by adverse possession or as claiming under the will, acquired an absolute right to the property. It is said that, having entered under the belief that she was entitled under the will, she is bound by the trusts of the will. There was a conveyance prepared, and executed by Thomas Nicoll, the nephew of the testator, by which he conveyed all his interest in the after-acquired freehold estate to the trustees of W. Nicoll's will, to be held by them upon the *trusts of the will; this, however, was not ex- [326 ecuted by the widow, and is not relied on by the plaintiff.

If the widow had been told the year after the death of the testator that she had no title, but that if she kept quiet for twenty years without saying anything about it, she would acquire a good title, the effect would have been that her title could not have been impugned; but she was not told till after the twenty years had expired. It was not till 1853 that she was told; and the plaintiff now says that the widow must be treated as having taken possession of the property subject to the conditions of the will. If that be so, the plaintiff would have a good title in equity to one-seventh share of the property.

It has been argued that the answer put in by Mrs. Nicoll, in the suit of *Paine v. Nicoll*, was an acknowledgment by her that she had entered into possession under the will, and that she must be bound by that admission, but I do not think that she was bound by the admissions in her answers, which were made when she was ignorant of her rights. It was not till after this period that she was told that the property did not pass by the will, and then, knowing for the first time that she had acquired a good title, the transactions took place which have led to this suit.

In the first place, by a deed of the 3d of August, 1853, the

widow conveyed the property for value, subject to her own life interest, to Jones, who was represented by his brother-in-law Johnston, and Jones, within a year after, conveyed one moiety to Johnston. At a subsequent period it appears that Miss Sandford applied to Johnston to know whether the property was for sale, and a correspondence took place which led to the purchase of the property by Miss Sandford for the sum of £400, and she after that sold the property to Salter; and those who claim under him, and who are represented by Mr. Glasse, are now in possession.

The question then is, whether they are to retain possession, or whether the plaintiff is entitled to possession. My opinion is that the plaintiff's title fails. The widow, though she thought that she was entering into possession under the will, was in fact entitled to treat herself as being in adverse possession. She performed no duty imposed under the will, and the cases relied upon by the plaintiff's counsel have no application.

327] *The principal case cited was *Board v. Board* (¹). In that case I should concur, for there the testator, Robert Amesbury, being tenant by the curtesy only, and having in fact nothing to devise, made a will and devised the property specifically to trustees for his daughter Rebecca for life, with remainder to his grandson William in fee, but subject to certain annuities. Rebecca entered into possession and enjoyed the property under the will, paying the annuities, and in every way showing that she continued in possession because she was a devisee under the will, and she was suffered by the heir-at-law to remain in possession undisturbed for more than twenty years. Then she let the defendant into possession, who claimed under her; but he, being privy in estate to her, was subject to all the estoppels that would have estopped her. The question, therefore, was, whether Rebecca, having taken under the will, which gave her an estate for life, was not estopped from saying that as against William, or the person claiming under him, the will, under which she came in as tenant for life, and under which William was the remainderman, was void. Mr. Justice Blackburn, upon these facts, said Rebecca could not be allowed to assert that, although she was let in and enjoyed under the will, nevertheless it was void, and that the heir-at-law was entitled to the land, and as twenty years had run against his title he was barred, and she, having acquired the fee by twenty years' undisturbed possession, could prevent William from taking under the will. Rebecca claimed under the

(¹) Law Rep., 9 Q. B., 48.

will and retained possession under the will, and she, as against everybody interested, in the will, was estopped from denying its validity. That is a case in which the parties claimed under the same interest.

The case of *Anstee v. Nelms* (*) is to the same effect. There there was a devise of all the testator's lands in the parish of Doynton, and it turned out that the land was not strictly in Doynton, but it was held that the testator intended to pass it. That case has no application.

Hawksbee v. Hawksbee (†) was also cited. There the testator had entered into possession of a house as tenant from year to year in 1810, and paid the rent till 1822, when the landlord died, and there was no person to receive the rent. The testator *continued in possession till 1837, when [328 he died, having devised his real and personal estate with power of sale for the benefit of his wife and children. The eldest son occupied the house, paying a rent to the widow for fifteen years after the death of his father, when the widow died; and it was held that, notwithstanding the infirmity of the testator's title, the son could not insist on retaining possession of the premises adversely to the devisees beneficially interested under the will, but that the latter were entitled to require the property to be sold and distributed according to the directions of the testator.

There was one other case relied upon, which was *Asher v. Whitlock* (‡), where it was held that a person in possession of land without other title had a devisable interest; and the heir of his devisee could maintain ejectment against a person who had entered upon the land and could not show title or possession in any one prior to the testator.

All these cases proceed on the principle that if parties have no other title than the will, they are estopped from denying the title of persons under the same will. Under this will the widow had no title whatever. The defendants had a title under the will. I think this is a distinct case of adverse possession, and the defendants claiming under the widow have acquired a title as against those persons whose title is only under the will.

As the plaintiff has no title, the bill must be dismissed with costs. If the parties consent to the bill being dismissed without costs, it is a different thing; but it can only be done by consent.

It was then intimated that the parties would consent to this course.

The order was therefore made that, by consent of all parties,

(*) 1 H. & N., 225.

(†) 11 Hare, 230.

(‡) Law Rep., 1 Q. B., 1.

the bill be dismissed without costs, except as to the trustees, whose costs were ordered to be paid.

Solicitor for the plaintiff: Mr. A. G. Ditton.

Solicitors for the defendants: Messrs. *Johnston & Jackson*; Messrs. *Gamlen & Son*; Messrs. *Nickinson, Prall & Nickinson*; Messrs. *Taylor & Baxter*.

[Law Reports, 18 Equity Cases, 329.]

V.-C.M., June 3, 1874.

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*POLLOCK V. POLLOCK.

[1874 P. 115.]

Apportionment Act, 1870—Bequest for Life of Dividends in a Company.

Bequest of stock in a canal company to trustees to pay the dividends to the testator's wife for life, and afterwards to fall into the residue:

Held, that the dividends were apportionable.

Whitehead v. Whitehead (¹) explained.

GENERAL POLLOCK, by his will, gave and bequeathed a sum of £5,000 guaranteed stock of the Madras Irrigation and Canal Company to trustees upon trust to pay the interest and dividends thereof to his wife, Lady Pollock, for life, and after her decease he directed that the said £5,000 stock should sink into and form part of his residuary estate.

The testator died on the 6th of October, 1872, and Lady Pollock died on the 14th of February, 1873. The dividends on the £5,000 stock of the Madras Irrigation and Canal Company were payable in June and December, and the representatives of Lady Pollock now claimed to be entitled to the half-yearly dividend which became due in December, 1872, without apportionment.

Mr. Glasse, Q.C., and Mr. E. Cutler, for the plaintiffs.

Mr. Cotton, Q.C., and Mr. Owen, for the defendant, cited *Whitehead v. Whitehead* (¹), in which the decision was that a specific legacy was not within the Apportionment Act, 1870, and *Capron v. Capron* (²) and *In re Cline's Estate* (³).

SIR R. MALINS, V.C.: The expression which I appear to have used in the case of *Whitehead v. Whitehead* is too wide. I do not think, as a general rule, that a specific be-
330] quest is not apportionable. In this case my *opinion is that there must be an apportionment of the dividends which accrued due in December, 1872, and also an appor-

(¹) Law Rep., 16 Eq., 528.

(²) Law Rep., 17 Eq., 288.

(³) *Ante*, p. 213.

tionment in favor of the representatives of Lady Pollock of the dividends which accrued in June, 1873.

Solicitors for the plaintiffs: Messrs. *Chauntrell & Pollock*.

Solicitor for the defendants: Mr. *R. Haynes*.

[Law Reports, 18 Equity Cases, 330.]

V.-C.M., June 22, 1874.

*AXMANN V. LUND.

[330

[1874 A. 58.]

Letters Patent—Presumption as to Validity—Circulars threatening Legal Proceedings—Plaintiff formerly Licensee of the Patent.

The court will restrain a patentee from issuing circulars threatening legal proceedings against infringers unless he will undertake to commence proceedings to assert the validity of his patent; and the fact that the party seeking the aid of the court was formerly a licensee of the patent under the patentee, and had himself concurred in issuing similar circulars, does not prevent the court interfering after the expiration of the license.

ON the 26th of November, 1864, the defendant, who was a manufacturing jeweller, filed a provisional specification for the purpose of obtaining letters patent for an invention for "Improvements in the manufacture of studs, brooches, bracelets, earrings, baskets, vases, and other such-like ornaments;" and, having no means of his own, was introduced to the plaintiff with a view to his furnishing capital to carry on the manufacture. Negotiations took place between the plaintiff and defendant, and ultimately a partnership was arranged between them on the basis of an advance by the plaintiff of the sum of £800. This advance was made, and a complete specification was filed by the defendant at the end of the year 1864 or the beginning of 1865.

The plaintiff and defendant continued to work the patent together, but the terms of the partnership were not arranged till the 29th of November, 1866, when they were embodied in a deed of that date, which provided that the plaintiff and defendant should continue and be partners together in the business of *manufacturing and vending the studs, [331] buttons, brooches, bracelets, earrings, baskets, vases, and other such-like articles, fastenings, and things, under and by virtue of the said letters patent for the period of ten years to be computed from the first of January, 1866, determinable as therein mentioned; and it was further provided that the patent rights should be considered as belonging solely to the defendant, but that no part, share, or interest therein

should be sold, assigned, or otherwise disposed of by him without the previous consent in writing of the plaintiff during the copartnership; and that each of the partners should be entitled to one equal half part of the profits of the business after making all proper deductions.

In the year 1868 the plaintiff and defendant, or some of their workmen, discovered and perfected a new process of manufacture, for which they took out a joint patent on the 21st of December, 1868, and filed a complete specification on the 21st of June, 1869. About the same time they discovered a third process, which they called the composite process, which, however, they did not patent. But they continued to manufacture jewelry according to all the three processes.

At various times during the partnership some small infringements of the patent of 1864 came to the knowledge of the parties, which they considered too insignificant to be worth notice. But near the end of 1871 a more important infringement was discovered, and the plaintiff and defendant took the advice of counsel as to whether proceedings should be commenced to restrain further infringements. They were advised that the specification was bad as it stood, but that it was possible that it might be made of some value by filing a disclaimer of parts of it; but this was found impracticable, and no proceedings were taken against the infringers.

The plaintiff and defendant subsequently finding that they could not continue to carry on business amicably together, dissolved partnership by a deed of the 2d of July, 1873, by which the plaintiff assigned to the defendant his interest in the business in the words following:

"All that one undivided moiety, or half part, or share of him the said Edmund Axmann, of and in the said stock-in-332] trade, credit, *and effects, and also all sums of money belonging or owing to the said copartnership business, and all the estate and interest of him the said Edmund Axmann therein."

After the termination of the partnership the defendant continued to occupy the business premises and to carry on a similar business to that previously carried on by them in partnership. The plaintiff, after trying for a short time another kind of occupation, determined to set up a business on his own account as a manufacturing jeweller at another place; and in order to terminate all doubt as to the respective rights of the parties in the patent of 1868, an agreement was signed by them which provided that the patent should be considered as the property of both in equal shares, and that all moneys,

benefit, and advantage to accrue from licenses, or from the user or working of the patent, or from rents, royalties, premiums, fines, or other payments, should be divisible between them, and that all fees for renewal or extension should be contributed by them in equal portions, and that each should be equally entitled to work the patent without making any payment to the other of them.

The result of these transactions was that the plaintiff and defendant had each of them an equal right to manufacture according to the patent of 1868, and equally so, of course, according to the so-called composite process; but that supposing the patent of 1864 to be valid, the exclusive right of manufacturing according to it belonged to the defendant.

The plaintiff commenced business in manufacturing articles according to all the three processes, and, according to the allegations of the bill, the business seemed likely to prove very profitable.

It was part of the plaintiff's case that he had only recently discovered that on the 15th of March, 1862, a provisional specification had been taken out for an invention which appeared to be an anticipation of the defendant's patent of 1864, and that the patent of 1864 was also invalid from the fact that on the 26th of May, 1864, the defendant had filed a provisional specification almost in the identical words of the subsequent one. Assuming this to be the case, the time for filing the complete specification had expired before it was filed, and the patent was bad on that ground.

*The bill alleged that soon after the plaintiff commenced business the defendant had begun to go about to the different customers of the plaintiff, asserting that the plaintiff, in manufacturing and selling his goods in his business, was infringing the defendant's patents, and threatening the plaintiff's customers with legal proceedings in case they continued to purchase from the plaintiff; and several instances were given in which it was proved that attempts had been made to induce different customers of the plaintiff to take the defendant's goods in preference to his.

Lithographed copies of two letters had also been circulated amongst the customers of the plaintiff; the first of which was a letter professing to be addressed by the defendant's solicitor to Messrs. Slater, Buckingham & Co., a firm who, it was stated, had advanced money to the defendant for the purposes of his business. The letter was as follows:

"I have been consulted by Mr. Waldemar Lund with reference to your purchasing and selling imitations of his patented goods. I beg to point out to you that by your selling

and supplying such goods you render yourselves and your customers liable to legal proceedings to restrain you from any further sale of them; and unless I receive your assurance that you will discontinue such sales in future, my client will take steps to prevent the injury which is being done this business by you and your customers.

"In the event of your not giving me the required assurance, I must ask you for the name of your solicitor."

This was accompanied by a letter from Messrs. Slater, Buckingham & Co. to the customer, which was as follows:

"Having received the above letter, we think it well to send you a copy of the same.

"For ourselves, we do not purchase or sell any imitation of Messrs. Waldemar Lund & Co.'s goods, and would recommend you to adopt the same course."

It did not appear that the defendant ever attempted to discriminate between goods manufactured according to the process of the patent of 1864 and the other modes of manufacture.

The defendant gave evidence to show that during the continuance of the partnership, whenever it was discovered that 334] any *infringements of the patent were going on, a copy of a circular which had been prepared for the purpose was sent to the parties supposed to be infringing, warning them that they were infringing the patent, and threatening proceedings against them; and that this course was continued after counsel had been consulted as to the validity of the patent. It also appeared that within a few weeks of the dissolution of the partnership the plaintiff had given the defendant instructions to look out for any parties who might be infringing the patent.

The bill prayed for an injunction to restrain the defendant from asserting to the customers of the plaintiff, or any of them, or any other person or persons whomsoever, that the plaintiff in manufacturing or selling his goods in his business was infringing the defendant's letters patent or patent rights, and from threatening such customers, or any of them, or any other person or persons, with legal proceedings in case they purchased or sold the plaintiff's goods.

The plaintiff now moved for an injunction accordingly.

Mr. Cotton, Q.C., and Mr. Romer, for the plaintiff: The patent of 1864 can be conclusively shown to be bad on several grounds. The plaintiff, however, has a right to require the defendant either to assert actively the validity of his patent by taking steps to maintain it, or to abstain from asserting that it is valid, and threatening legal proceedings, to

which he has no intention to resort: *Rollins v. Hinks* (*), which was a case in all respects similar to the present.

Mr. Glasse, Q.C., and Mr. Jason Smith, for the defendant: If this case were exactly like *Rollins v. Hinks* no argument would be possible; but there is just that distinction between the cases which was pointed out in the judgment in that case, namely, that the rule there laid down might not apply where the question was as to a patent many years old. This is quite in accordance with the old distinction between patents which had long remained undisputed, in which the court would grant an injunction pending an action to try the validity, and new patents where no injunction *was [335 granted pending an action, and the present case is still open for decision. The plaintiff is in the position of having executed a deed admitting the validity of a patent, and cannot afterwards turn round and say the patent was always bad. That would be allowing him to derogate from his own grant. He could not have questioned the validity of the patent during the continuance of his license to use it, *Crossley v. Dixon* (*), and after having in effect assigned all his estate and interest in it as part of the partnership assets, he cannot afterwards question it: *Chambers v. Crichtley* (*). Here, also, the plaintiff has been himself doing the very thing during the partnership which he now seeks to prevent the defendant doing. The issue of these circulars by the defendant is no more than was done by both during the partnership, and was continued after the time when, according to the plaintiff's view, the invalidity of the patent was known by means of the opinion of counsel.

SIR R. MALINS, V.C., after remarking upon the facts of the case, continued:

If the plaintiff and the defendant had been mere strangers without any connection in business the case would be covered by my decision in *Rollins v. Hinks* (*), to the principles of which I now adhere, that a patentee is not at liberty to go on threatening proceedings against other persons for infringing his patent unless he follows up those threats by proceedings to establish its validity. I there stated that if the defendant could not be restrained from continuing to use those threats, a man by taking out a patent for something old might issue circulars to prevent others from selling an article which was sold years before the patent. Mr. Glasse admitted that if this case were like *Rollins v. Hinks* he could not dispute the law there laid down, or defend the proceedings of the defendant.

(*) Law Rep., 13 Eq., 355.

(*) 10 H. L. C., 293.

(*) 33 Beav., 374.

The argument has turned upon the question whether this case is or is not distinguishable from *Rollins v. Hinks*. Now here the plaintiff and defendant have not been mere strangers. It appears that the defendant took out his patent in 336] the year 1864, *and the plaintiff afterwards joined him as partner. One of the provisions in the articles of partnership was that the patent rights of 1864 should be considered as belonging solely to the defendant, but that no part, share, or interest thereon should be sold, assigned, or otherwise disposed of by him without the previous consent in writing of the plaintiff during the copartnership. Then these two gentlemen went on from 1866 to 1873, working this patent together, and during that time I think it is distinctly proved that the plaintiff, in concurrence with the defendant, continued to assert the validity of the patent by issuing circulars warning the public from infringing it. [His honor then referred to the evidence on this point, and continued:] On the 2d of July, 1873, the partnership was dissolved, without any reservation to the plaintiff of any rights in the patent of 1864, it being assumed on both sides, and I think correctly, that whatever patent rights there were belonged to the defendant. As to whether the patent is valid or invalid, I give no opinion. That is not the question before me. There seems very strong reason to doubt its validity, because it is positively asserted that the complete specification is dated more than six months after what must be considered to be the provisional specification. But I give no opinion upon the validity of the patent. If it is valid at all, the defendant is entitled to restrain any person from manufacturing any article covered by it. If, on the other hand, it is invalid, he has no right to use these threats to the public, which are calculated, not only as to the plaintiff, but as to everybody else, to destroy business. Many persons would immediately cease selling an alleged patented article rather than run the risk of being drawn into a litigation which might be of a very formidable character. And the utmost danger might be occasioned to the public if a man were to take out a patent for a thing notoriously of great antiquity, and by issuing circulars to monopolize a very large trade and destroy the trade of others. Therefore, I think it is of the utmost importance that this sort of threatening should be only allowed within justifiable limits.

It is argued on behalf of the defendant that the plaintiff has acted so as conclusively to admit the validity of the patent, as between himself and the defendant. That question cannot be decided now. The defendant's proper course,

if he wishes to raise *that point, will be to take some [337 proceedings to restrain the plaintiff from disputing the validity of the patent, or by some action against him to put in issue his right to dispute it. As regards the actual notice issued by the defendant, the terms of it are, in my opinion, wholly unjustifiable. There are two patents, one taken out in 1864 by the defendant before the commencement of the partnership, and the other taken out in 1868, in the joint names of and with the sanction of the partners during the partnership; and though after the dissolution both partners had an equal right to use the patent of 1868, no distinction was drawn between the two patents in these notices.

It still remains to be considered whether the plaintiff has conclusively bound himself to admit the validity of the patent. There is no doubt whatever that a man who acquires a license to use a patent cannot dispute its validity as between himself and the patentee during the currency of the license, just in the same way as a tenant is estopped from disputing the title of his landlord during the currency of his tenancy. But at the expiration of the license he is as much at liberty to dispute it as if he had never had a license at all, just as a landlord's title may be disputed by a tenant after the tenancy has expired. Now, undoubtedly during the continuance of the partnership the plaintiff had by contract, as licensee, according to *Crossley v. Dixon* (1), precluded himself from disputing the validity of the patent. But the case is quite different when the license has expired, and new facts may have been since discovered which were perhaps kept carefully concealed during the partnership, such as the case here suggested as to the date of the provisional specification rendering the patent invalid. It is said that, because the plaintiff admitted the validity of the patent during the continuance of the partnership, and asserted it, probably in good faith, he is, after the termination of the partnership, no longer at liberty to dispute its validity; and Mr. Glasse based an argument upon the fact of the patent being ten or twelve years old, and he relied upon the old rule of the court never to grant an injunction till a patent had been established at law, unless it was of old date, but that if it was old, and the public had long acquiesced in the use of it, an injunction was sometimes granted *pending the [338 trial, though even in that case the validity of the patent had to be tested by an action at law.

Then the result of all this is that, in my opinion, the plaintiff did during the partnership preclude himself from any

(1) 10 H. L. C., 298.

right to dispute the validity of the patent. But after its expiration he became at liberty just as much as the rest of Her Majesty's subjects to dispute its validity, subject, however, to be answerable in damages in case the defendant establishes the validity of the patent in any proceedings against the plaintiff. The defendant declines to undertake to take proceedings at law to establish the validity of the patent, and I retain the opinion I expressed in *Rollins v. Hinks* (¹), that as he will not follow up the rights he asserts by proceeding to establish the validity of the patent, he ought to be restrained from circulating threats. I shall follow that decision, and grant an injunction against the defendant's issuing circulars; prefaced, however, by a statement that the defendant declines to undertake to take legal proceedings to establish the validity of the patent.

Solicitors: Messrs. *Lattey & Hart*; Mr. *S. J. Robinson*.

(¹) Law Rep., 18 Eq., 355.

[Law Reports, 18 Equity Cases, 338.]

V.-C.M., June 26, 1874.

In re STRATHMORE ESTATES.

Lands Clauses Act—Notice to treat—Abandonment of part of Undertaking—Costs out of Fund.

A railway company having power to take compulsorily certain portions of an estate, served notices to treat for them. They afterwards abandoned part of their undertaking, including the land comprised in some of the notices, but took the rest and paid the purchase-money into court, the estate in question being the subject of a testamentary settlement. Before the abandonment certain costs, charges, and expenses had been incurred by the tenant for life under the settlement, and certain other costs were subsequently incurred in an unsuccessful attempt to obtain compensation for not going on with the notice to treat in respect to the abandoned portions:

Held, on a petition by the tenant for life for investment of the fund in court, that these costs, charges, and expenses might properly be paid out of the fund before investment.

THIS was a petition for the investment of a sum of £1,087 10s., which had been paid into court by the Hemel Hempstead and *London and North-Western Railway Company, as the purchase-money and compensation for certain land taken by the company, and for payment of the dividends thereon to the petitioner, Lady Glamis, for her life.

The pieces of land in question formed part of the settled estates of the Earls of Strathmore in Hertfordshire, which were devised by the will of the late Lord Glamis to the petitioner for life, and subject thereto to the use and behoof of such one or more of the son or sons, daughter or daugh-

ters, of himself and the petitioner, for such estates and interests as the petitioner, notwithstanding coverture, might by deed or by her last will and testament direct, limit, and appoint of and concerning the same, with divers remainders over, under which the present Earl of Strathmore, the eldest son of the late Lord Glamis, was interested.

On the 12th of June, 1869, the Hemel Hempstead and London and North-Western Railway Company served notice upon the petitioner and Lord Strathmore to treat for certain portions of the Strathmore estates in Hertfordshire, which they were entitled to take under the powers of some of their acts. The company subsequently abandoned part of their undertaking, and some parts only of the land comprised in the notice to treat were actually taken. The fund now in court represented the part so taken.

The petitioner had, however, before the abandonment, incurred certain costs, charges, and expenses in and about the parts of the Strathmore estates which were not actually taken by the company, and also in attempting to enforce payment by the company of compensation for their failure to act upon such notices to treat given by them as comprised land required for their abandoned railway; and the petition asked that the residue of the costs, charges, and expenses not properly payable by the company might be paid out of the fund in court.

Mr. *D. Sturges*, for the petitioner: Costs were allowed out of a fund in court under similar circumstances by Vice-Chancellor Stuart in *Re Aubrey's Estate* (¹). This application is made with the concurrence of the Earl of Strathmore, though he is not made a respondent.

*Mr. *Hemings*, for the company.

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SIR R. MALINS, V.C.: I am of opinion that the order in *Re Aubrey's Estate* (¹) was quite right, and I shall follow it. The case appears somewhat similar to a matter of *In re Lopes' Trusts*, which came before me on the 1st of May last, and on which I made an order similar to the one now asked for. I think, however, that the Earl of Strathmore should be made a co-petitioner, and subject to this amendment the order will be made as prayed.

Solicitors: Messrs. *Western & Sons*; Mr. *G. E. Forster*.

(¹) 17 Jur., 874.

[Law Reports, 18 Equity Cases, 340.]

V.-C.M., June 27, 28, 1874.

MATTHAEI V. GALITZIN.

[1873 M. 167.]

Jurisdiction of Court—Plaintiff and Defendant Foreigners—Contract Foreign—Subject-matter Foreign—Demurrer.

Bill filed by a foreigner against another foreigner, and against an English company formed for working a Russian mine, to restrain the English company from paying to a foreigner part of the profits of the mine which were claimed by the plaintiff, by way of commission, and also for an account of profits against the company.

Demurrer allowed.

THIS case came on upon two demurrers for want of equity to a bill filed by the plaintiff, Julie Matthaei, of the Charing Cross Hotel, London, and of Antwerp, in Belgium, widow (administratrix in England of Carl Friedrich Matthaei, formerly of Hanover, but a naturalized British subject, and now dead), against the Princess Anna D. Galitzin and the Russian Ironworks Company, Limited. The bill stated, that in and previously to the year 1863, Ivan Chepeleff and Nicolas Chepeleff were entitled to certain minerals and other property in Russia, known as the works of Vicksa, and having become embarrassed were desirous of getting up a company, established in England, for working the same. 341] *In November, 1863, Ivan and Nicolas Chepeleff entered into an agreement with Carl F. Matthaei, then of Hanover, merchant, whereby they gave him powers to raise money and form a company for the purpose of developing and working the said property; and they agreed on their own behalf and that of their heirs and successors, that if the said Carl Matthaei should, either by establishing a company or otherwise, succeed in procuring the said property to be developed and worked to a profit to themselves, they would pay him a commission of £10 per cent. upon all moneys which should be payable to or be received by them during the whole period of such working; but it was understood that the advantage promised to the said Carl Matthaei was to be in force only in case he should, by means of a company, or otherwise, procure the necessary capital or funds for developing and working the property.

The said Carl Matthaei, acting upon the said authority and agreement, expended much time and money in endeavoring to obtain the funds necessary for working the said

property, and ultimately succeeded in establishing the defendant company, which was incorporated in the year 1865, under the Companies Act, 1862, and the company obtained from Ivan and Nicolas Chepeleff a lease or grant for the working of the property for the term of thirty-seven years upon certain terms, one of which was, that the net profits to be obtained by such working should be shared between the defendant company and Ivan and Nicolas Chepeleff, and their heirs and successors, in the proportions of two fifth parts thereof for the defendant company and three fifth parts thereof for the said Ivan and Nicolas Chepeleff and their heirs or successors to the property.

The defendant company had, ever since 1865, obtained large sums from working the property. The said Ivan and Nicolas Chepeleff were both dead, and the beneficial interest in the property had devolved upon the defendant, the Princess Anna Galitzin, who was now entitled to three fifth parts of the profits derived therefrom, but subject to the payment thereout of the commission under the agreement with Carl Matthaei.

The defendant company had paid to the defendant Anna Galitzin considerable sums of money, amounting in the year *1872 to £43,000, or thereabouts, in respect of her [342 three fifth shares of the profits.

Carl Matthaei died in the year 1868, and on the 9th of February, 1869, letters of administration of his estate and effects were granted to the plaintiff in England, whereby she became the legal personal representative of the said Carl Matthaei. The defendant Anna Galitzin was now resident in Russia, out of the jurisdiction of this court.

The plaintiff had applied on several occasions to the defendant Anna Galitzin for an account of the moneys she had received from the company in respect of her three fifth shares of the profits of the working of the property, and also to pay to the plaintiff the amount of the commission at £10 per cent. upon the moneys so received by her, but she had refused to come to such account or make such payment, and being resident in Russia, had, in fact, neglected to give any answer to the plaintiff's letters or applications.

In addition to the sums already paid to the defendant Anna Galitzin by the defendant company, there was a large sum accruing due to her in respect of her three fifth shares in the profits of the working of the property, and the defendant company proposed and intended, without regard to the plaintiff's rights, to remit to Russia, to the defendant Anna Galitzin, the amount due to her. The plaintiff alleged

that she had no means of ascertaining what was properly payable to the defendant Anna Galitzin except through the defendant company, and the plaintiff had no power, except through this court, of obtaining such information from the defendants, or of obtaining the money payable to her.

The bill therefore prayed that the plaintiff might be declared entitled to receive from the defendant company, out of the moneys payable by them to Anna Galitzin, a sum equal to £10 per cent. upon all the moneys already paid by the company to Anna Galitzin, and upon the amount now due to her from the company; and the bill prayed an account against the company of all such moneys, and that the company might be ordered to pay to the plaintiff what should be found due to her, and that in the meantime the company might be restrained by injunction from paying to Anna Galitzin any of the moneys due or payable to her; and 343] *that the defendant Anna Galitzin might be restrained from receiving the same except upon making proper provision for liquidating thereout in England the plaintiff's claim.

Mr. Glasse, Q.C., Mr. Simpson, and Mr. Gill, for the demurrer by the Russian Ironworks Company: The court has no jurisdiction to decide this case. The question is one arising between two foreigners, and the subject-matter in dispute is foreign. The company, although it has an office in England, is in fact a Russian company, and the property worked by the company is in Russia. This point as to the jurisdiction of the court has been conclusively decided in *Norris v. Chambers* (*). A director of a company established in England to work mines in Prussia had paid a large sum towards the purchase. The vendor annulled the contract, and resold the mines to a new company with notice, and a bill by the representative of the director to establish a lien on the estate for the advances was dismissed, on the ground that a suit between parties residing here to enforce a lien on immovable property situate out of the jurisdiction required that some special state of circumstances should be established to enable the court to give any relief. This was affirmed by Lord Campbell (*), who decided that the court would not interfere if the subject-matter of litigation was in a foreign country where there were courts having the means of deciding upon and enforcing the rights of the parties. There was a similar decision in *Cookney v. Anderson* (*), where a bill was filed to administer the trusts of a Scotch creditor's deed, under which a mining concern in Scotland

(*) 29 Beav., 246.

(*) 3 D. F. & J., 583.

(*) 31 Beav., 452.

was to be carried on by a trustee, all the parties except the plaintiff being domiciled in Scotland, and a demurrer to the bill was allowed by the Master of the Rolls. That decision was also affirmed⁽¹⁾. Then, in *Blake v. Blake*⁽²⁾, your honor followed *Cookney v. Anderson*, and allowed a plea to the jurisdiction where the contract was entered into at Boulogne between the plaintiff, who was resident there, and an Irishman, relating to property in Ireland.

*Another objection is, that the plaintiff is the repre- [344
sentative of an agent, who is alleged to have been entitled to a commission, and the bill is filed against the lessor and the lessee to recover his commission. It is the same thing as if a house agent, entitled to a commission upon letting a house, were to file a bill against the lessor and lessee to establish his right to the commission. That is not a subject to be dealt with by a court of equity. The interest of the plaintiff's husband is alleged to have been created prior to the lease; that is, by an agreement between him and the two Chepeleffs, the agreement being that if Matthaei should form a company for working the mines at a profit, the Chepeleffs would pay him a commission of £10 per cent. upon all moneys received by them during the whole period of the working. That being so, the lease was executed, and the inference is that the plaintiff's husband was privy to the granting of the lease under which the company covenant to pay the moneys received, partly to the Chepeleffs; but the bill now seeks to restrain the company from performing the covenants in the lease to which Matthaei was in fact a party. Assuming that the plaintiff has some lien upon the property, that question really depends upon Russian law, not English law, and cannot be decided by this court.

[The VICE-CHANCELLOR: Suppose the Princess Galitzin had not appeared to this bill, how could her appearance have been enforced? The company is sued to prevent them from paying money to the Princess, but suppose they do pay it, what remedy has the plaintiff against her?]

The plaintiff has no remedy in this country in that respect; but if the proceedings had been instituted in the Russian courts, she would have had a complete remedy; and there is nothing to show that she has any difficulty in asserting her rights in the Russian courts.

The Princess not being a resident here, this court can exercise no jurisdiction over her, nor can it enforce any order made against her. The court cannot put her in contempt, and cannot get at her property. The bill is therefore a mere

(1) 1 D. J. & S., 365.

(2) 18 W. R., 944.

brutum fulmen; it offends against every principle, and the demurrer ought to be allowed.

345] *Mr. Cotton, Q.C., and Mr. Kenyon Parker, for the demurrer by the Princess Galitzin: We advance the same arguments as the company, that the plaintiff and defendant being both foreigners, and the property situate abroad, there is no jurisdiction in this court.

The plaintiff claims under an agreement entered into by her husband, to whom letters of administration were granted her in England, but Matthaei was, at the time the agreement was executed, a Hanoverian merchant, and there is nothing shown to take the case out of the jurisdiction of the foreign courts. It is a mere money demand, to be paid out of profits collected in Russia. It is governed by the case of *Mayor of London v. Cox* (¹), where the garnishee moved to restrain a foreign attachment. In that case Mr. Justice Willes says (²): "The defendant may have an answer by way of payment, or release, or discharge by the law of his own country, which he may despair of establishing according to the rules of evidence used in a foreign jurisdiction; or a bar by way of prescription, which, as being matter of procedure, will be inadmissible there. The place where he is sued may thus be all important; and shall it depend upon the will of his debtor, who is in default, to elect for him a jurisdiction? That would be to affect A. by the unauthorized act of B., over whom he has no control, and therefore it is not merely different from law, which a valid custom may be, but contrary to a principle of justice, which no valid custom can be."

Mr. Cottrell (Mr. Higgins, Q.C., with him), in support of the bill: There is nothing to prevent this court from having jurisdiction in a case like the present. The statement in the bill describes the plaintiff, Julie Matthaei, as of the Charing Cross Hotel. Her husband is described as a naturalized Englishman, and letters of administration were granted to the plaintiff. The domicile of a widow is the domicile of her husband, consequently the plaintiff is sufficiently an Englishwoman to support a bill in this court. Then with regard to the defendants, there is no allegation 346] in the bill that the Princess Galitzin is not a British subject. Her name is no doubt foreign, but the case being now heard upon demurrer, there is nothing but the bill from which any conclusion can be drawn, and the Princess must be taken to be a British subject until the contrary is shown. The Russian Ironworks Company, although having a foreign title, is undoubtedly an English company,

(¹) Law Rep., 2 H. L., 239.

(²) Law Rep., 2 H. L., 268.

formed under the English Joint Stock Companies Acts, and having an office in London for the transaction of its business. The object of the company is to work a Russian mine, but the proceeds are remitted to England, and are divided here among the shareholders: *In re General Company for Promotion of Land Credit*(¹).

The allegation in the bill is that the company have a large sum of money out of the profits acquired by them from the working of the property, and what we seek is an injunction to restrain them from parting with that money in contravention of the agreement with Carl Friedrich Matthaei. We do not ask for a lien upon the rents and profits of the property in Russia, but we ask an account against the English company of moneys remitted to them and distributed, and of moneys now in their hands ready for distribution. We claim a right to a certain part of that money, and we ask an injunction to restrain the company from parting with it. The subject-matter of the suit, therefore, is not foreign; and the plaintiff being a British subject, the company being English, and there being no allegation that the defendant, Princess Galitzin, is a foreigner, this is the proper court to come to for a redress of our rights, which are distinctly shown upon the bill.

In *Maunder v. Lloyd*(²) and *Hendrick v. Wood*(³) the court decided that it could exercise jurisdiction where the subject-matter was foreign. The former of these suits was instituted to wind up a partnership in Hayti, where the property was situate; and in the latter case the property was in Jamaica. Therefore we have authority for filing a bill to enforce this claim.

SIR R. MALINS, V.C.: I think it is clear upon the face of the bill that there is no right against the company if there is none against the Princess Galitzin. *They are made [347 parties as stake-holders, and it is said they are bound to pay the Princess three-fifths, subject only to the liability of paying the 10 per cent. commission to the plaintiff.

If, therefore, the bill fails against the Princess, it must necessarily fail as against the company. That would be the case at the hearing of the cause. The bill, therefore, must be regarded as a bill against the Princess. What, then, are the facts? Here is a case in which the husband of the plaintiff, who was a foreigner, entered into a contract with another foreigner respecting property situate in a foreign country. What right in such a case can there be to sue

(¹) Law Rep., 5 Ch., 363; Ibid., 5 H. L., 176.

(²) 9 W. R., 588.

(³) 2 J. & H., 718.

here? Can any one sue in the courts in this country in matters relating to foreign property, the contract being foreign, and both parties foreign subjects?

Certainly, according to my view, it is no part of the business of this court to settle disputes between foreigners. There must be some cause for giving jurisdiction to the tribunals of this country; either the property or the parties must be here, or there must be something to bring the subject-matter within the cognizance of this court. This is the case of a plaintiff who, though now stated to be living at the Charing Cross Hotel, is resident at Antwerp; and it is admitted she is a foreign subject suing another foreign subject. If I were to overrule the demurrer and allow the suit to proceed, it would under such circumstances be useless. It would be a grievous hardship if a foreigner residing in a foreign country, and having property in that country, where there are tribunals in which the rights of subjects of that country can be asserted, could be dragged into the courts of this country and be subjected to the annoyance of all the proceedings in these courts. It is certainly a jurisdiction which ought not to be exercised except in cases of absolute necessity. Then arises the question whether the plaintiff is entitled to any remedy against the Princess, and if she is not, then she is not entitled as against the company.

All the cases cited go upon the same principle—such as *Blake v. Blake* (¹), *Norris v. Chambers* (²) and *Cookney v. Anderson* (³)—and they show that you cannot sue a foreigner [348] in this country, *unless the parties are resident here or the property is situate in this country.

I find my opinion in *Blake v. Blake* (¹) follows those authorities. That was a case in which the plaintiff was a foreigner resident at Boulogne, and the defendant was an Irishman, for that purpose also a foreigner, and resident in Ireland, for the sale of some land in Ireland, and the contract was entered into at Boulogne. A receiver of the property had been appointed by the Court of Chancery in Ireland, and a bill was filed in this court asking that certain deeds relating to the property might be ordered to be given up. I find that I made these observations in that case: I had no doubt that when persons who were resident here entered into a contract, though the subject-matter of the contract was abroad, yet that the contract might be sustained; but when neither party had anything to do with this country, and the subject-matter was not situated here, as in that case,

(¹) 18 W. R., 944.

(²) 29 Beav., 246; 3 D. F. & J., 583.

(³) 31 Beav., 452; 1 D. J. & S., 365.

then, if the plea were overruled, the court might as well be called upon to interfere in the affairs of all countries. Two Frenchmen might come here to have their disputes decided. Ireland for this purpose was a foreign country. They had a Court of Chancery of their own; and though it had been said it was not a suit to recover land, yet the effect of it was to recover an estate. I there stated that the case was, in my opinion, governed by *Cookney v. Anderson* (¹), and the circumstances of the land being in Ireland, and the defendant resident in that country, were sufficient to show that the bill ought not to have been filed in this court. So I say in this case, that neither the plaintiff nor the defendant being resident in this country, and the subject-matter not being situate here, it is a case which this court has nothing to do with, and the demurrers must be allowed.

The last two cases which were cited—*Maunder v. Lloyd* (²) and *Hendrick v. Wood* (³)—seem to have no application; but as far as they go they are not authorities in favor of the plaintiff, for though the parties were foreigners, the property was partly in this country.

My opinion is, therefore, that a foreigner resident abroad cannot *bring another foreigner into this court respecting property with which this court has nothing to do. This court is not to be made a vehicle for settling disputes arising between parties resident abroad.

If the plaintiff asks for leave to amend, it is not a case in which I should give leave.

It was stated that leave to amend was not asked, and the demurrers were, therefore, simply allowed.

Solicitor for the plaintiff: Mr. J. R. Bailey.

Solicitors for the defendants: Messrs. Rickards & Walker.

(¹) 31 Beav., 452; 1 D. J. & S., 365.

(²) 2 J. & H., 718.

(³) 9 W. R., 588.

The courts of one country have jurisdiction of actions to compel the specific performance of contracts to convey real estate in another: 2 Story's Eq. Jur., §§ 743, 744; *Bayley v. Ryder*, 10 N. Y., 363; *Newton v. Bronson*, 13 N. Y., 587; *Cleveland v. Burrell*, 25 Barb., 532; *Gardner v. Ogden*, 22 N. Y., 327; *Fenner v. Sanborn*, 37 Barb., 610; *Angus v. Angus*, West's Chy., 28 and note; *Stratton v. Davidson*, 1 Russell & Mylne, 484, and Dunlap's note to Banks's ed., p. 485; Hilliard on Inj., (1st. ed.), 234, note.

discretion: *Mariposa Co. v. Garrison*, 26 How. Prac., 448.

And so in a proper case a party will be restrained by injunction from proceeding in the courts of another country: *Harrison v. Gurney*, 2 Jac. & Walk., 563; *Bushby v. Munday*, 5 Madd., 297; *Elliott v. Lord Minto*, 6 Madd., 16; *Lord Portarlington v. Soulbey*, 8 Mylne & Keene, 104; *Diggs v. Wolcott*, 4 Cranch, 179; *Bicknell v. Field*, 8 Paige, 440; *Ward v. Arredondo*, Hopkins, 213; *Watkins v. Holman*, 16 Peters, 57; *Salt v. Donnegall*, Lloyd & Gould, 82; *Mitchell v. Smith*, 1 Paige, 287;

Although the doing so is a matter of

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Payne v. Evens.

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Brevcoort v. McJimsey, 1 Edw. Chy., 551; *Wedderburn v. Wedderburn*, 2 Beavan, 208; *Hyde v. Kemble*, 1 Simons & Stuart, 7; *Kerr on Inj.*, 154-160; *Hilliard's Inj.*, 37, 234.

As to when pendency of suit in state

courts is bar to one in federal court and *vice versa*: See Moak's Van Sant. Pl., 498, note 2, Id. 865.

In such cases the court acts upon the party and not the foreign court: *Bispham's Eq.*, § 408.

[Law Reports, 18 Equity Cases, 356.]

V.-C.B., April 18, 21, 1874.

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*PAYNE V. EVENS.

[1872 P. 31.]

Trustee and Cestui que Trust—Bill for Account—Lapse of Time—Negligence in omitting to keep Accounts—Costs.

The estate of a testator who died in 1832 was distributed in 1847, as the evidence showed, at the written request of the persons beneficially entitled. Another part of the estate which fell in in 1862 was distributed also at the request, but not in writing, of the beneficiaries, and in 1871 the acting trustee died. No accounts or vouchers were forthcoming from the trustees.

Bill, filed in 1872 by one of the beneficiaries and her husband against the surviving trustee, and the representative of the deceased trustee, for administration, dismissed; but owing to the negligence of the trustees in not keeping accounts and vouchers, without costs.

MOTION for decree.

By a deed dated the 18th of March, 1825, it was declared that a sum of £1,106 14s. 9d. New Four per Cent. Annuities, standing in the names of John Henry Seale and John Boger, should be held by them upon trust to permit John Hamblyn Luscombe, his executors, administrators, and assigns, to receive the dividends, interest, and proceeds to and for his and 357] their own use, so long as he or they *should pay an annuity of £20, bequeathed by the will of his father to Brooking Agnes Soper, and also a legacy of £200, bequeathed by the same will, and then remaining to be paid to Edward Luscombe Soper, under the same will; and after the decease of Brooking A. Soper, and payment of all arrears of the annuity, and of the legacy to Edward L. Soper, upon trust that the trustees should assign the fund to John Hamblyn Luscombe, his executors, administrators, and assigns, for his and their own use and benefit.

In 1828 the legatee, E. L. Soper, attained twenty-one, and thereupon the legacy of £200 was paid by a sale of a portion of the above fund; which, by this means, and by conversion of the stock, became reduced to a sum of £906 14s. 9d. New Three per Cent. Annuities.

On the 29th of January, 1831, John Hamblyn Luscombe made his will, whereby, after specific bequests, he devised

all the residue of his personal estate to John Godfrey Teed, barrister-at-law, Deeble Boger, and William Hole Evens, upon trust to call in and convert, and after payment of debts, funeral and testamentary expenses and legacies, to invest the trust moneys as therein directed, and stand possessed thereof upon trust, subject to a life estate in favor of the testator's widow, for all and every his children and child who should attain twenty-one, or being a daughter, marry under that age, in equal shares. Testator appointed the three trustees his executors.

He died on the 18th of November, 1832, and the will was proved by Messrs. Teed and Evens only, Deeble Boger having refused to act.

The testator, J. H. Luscombe, had four children, who attained vested interests, namely, Helling Louisa Luscombe, who married Arthur Fleming Stack Payne, John Teed Luscombe, Sarah Hamblyn Luscombe, who married Arthur Rowlatt, and Caroline Maria Luscombe.

Mrs. Rowlatt died in 1849. In 1852, the annuitant, Brook- ing Agnes Soper, died, all arrears of the annuity having been paid; and in 1862 Caroline Maria Luscombe died un- married.

In October, 1871, Mr. Teed died, and his will having been proved by his widow and executrix, Martha Augusta Teed, she was now his sole legal personal representative.

On the 19th of February, 1872, this bill was filed by Mr. and *Mrs. Payne against William Hole Evens and [358 Mrs. Teed, alleging that at the request of Messrs. Teed and Evens, the trustees of the fund of March, 1825, sold the £906 14s. 9d. stock, and paid the proceeds, amounting to £815 1s. 4d., to Messrs. Teed and Evens, as executors of John H. Luscombe; that the testator, J. H. Luscombe, died seised and possessed of real and personal estate far more than sufficient to pay his debts, funeral and testamentary expenses, all of which had been long since paid, and that the plaintiffs had from time to time received small sums on account of the female plaintiff's fourth share in the residue; that the plaintiffs had only recently become aware of the facts of the declaration of trust of March, 1825, and of the death of the annuitant Brook- ing A. Soper; that they had not, and neither of them had ever been paid one-fourth of the £815 1s. 5d., and that a sum was due to the plaintiffs in respect of other parts of the residue; and that the plain- tiffs had made friendly but ineffectual endeavors to induce the defendants, and also John Godfrey Teed in his lifetime, to furnish accounts of the testator's residue, and to account

for and pay to them the female plaintiff's share in the £815 1s. 5d. The bill prayed for an administration of the testator John H. Luscombe's estate; that if the defendant Martha A. Teed should not admit assets, that the estate of J. G. Teed might be administered: and that the defendant Evens and the estate of J. G. Teed might be charged with interest upon all sums received, and not paid over by them.

The defendant William H. Evens, by his answer, said that he was now in his eighty-first year, and with respect to many of the matters alleged, never had any personal knowledge; that the practical management of the trusts of the will was left almost entirely to his co-executor Mr. Teed, by whom, defendant believed, all the accounts were kept, and in whose hands almost all documents relating to the trusts were left. Defendant had no means of refreshing his memory by reference to any documents, except a few papers and letters. To the best of his recollection, he stated as follows: The testator's real estate was inconsiderable. The net residuary personalty amounted to about £1,600, other than the trust fund of March, 1825, which did not come into the hands of himself and his co-executor until 1855. In accordance [359] with the trusts of the will, a sum of about £400, part of this, was paid to John Teed Luscombe on his attaining twenty-one; and a portion of a similar sum was paid to Caroline Maria Luscombe on her attaining twenty-one; and the rest, upon her dying intestate, was divided between the female plaintiff and Mrs. Rowlatt. The rest of the £1,600—being about £800, representing the fourth shares of the female plaintiff and Mrs. Rowlatt—was not paid to them on their attaining twenty-one, but, in the year 1845 or 1846, and in January, 1847, was, at the express request of the female plaintiff and Mrs. Rowlatt, both of whom had then attained twenty-one, and were unmarried, paid to their brother John Teed Luscombe, and the sum, at their request, secured by his bond, and defendant thought, also by two policies of assurance upon his life. These policies the defendant believed were shortly afterwards, with the knowledge and consent of the sisters, allowed to drop, in consequence of John T. Luscombe falling into difficulties. With respect to the bond, the defendant could give no information.

With respect to the sum of £815 1s. 5d., which was paid over to the defendant Evens and his co-executor in 1855, the defendant said that the whole of Mrs. Rowlatt's share was paid to her, and "a considerable portion of such sum" was applied by him and Mr. Teed, at the request of the female plaintiff and her sister Caroline and her brother, "in the dis-

charge of certain debts" owing from the female plaintiff, then unmarried, and her sister, and also of the debts owing from their mother, who had then lately died, and the rest of the sum was forthwith divided between the female plaintiff and her sister equally. Defendant had no doubt that proper receipts were taken by Mr. Teed. He said that for twenty-five years prior to August, 1871, he had not received, and, so far as he knew, Mr. Teed had not received, any application whatever as to any part of the testator's estate, except as to the £815 1s. 5d., when the same became divisible, or any application for accounts, or any complaint as to their conduct, or as to the management of the trust matters. He submitted whether the plaintiffs were not bound to account for the serious and unreasonable delay for which they alone were responsible, and which had made it so difficult for himself and his co-defendant to meet the case set up by the bill; and submitted that such delay had, under the circumstances, *disentitled the plaintiff to any part of the relief [360 prayed against him or the estate of Mr. Teed.

Mrs. Teed answered by stating her entire ignorance of the matters alleged.

From the evidence it appeared that, after the bond had been given by John Teed Luscombe, he became a bankrupt, and the bond was rendered worthless; but that the plaintiff sued her brother on the bond.

The statement that Mrs. Rowlatt received her share of the £815 1s. 5d. was shown to be erroneous, she having died in 1849.

A letter of authority, dated the 5th of January, 1847, addressed to Messrs. Teed and Evens, as executors of J. H. Luscombe, signed by Mrs. Luscombe, the widow, and H. Louisa Luscombe and Sarah H. Luscombe, requesting them to sell out the fund then standing in their names, and pay the same to John Teed Luscombe on receipt of a bond from him, and the amount already advanced by them to him, was produced in evidence.

A copy of entries from April to July, 1855, in the ledger relating to the account formerly kept by the defendant Evens with Bulteel & Co., bankers of Plymouth, was also produced. Defendant said it was the only detailed statement which he could render or produce or procure with respect to the application of the £815 1s. 5d. He explained that two sums of £100 and £10 drawn in favor of "self" were spent in paying small bills; and that a sum of £203 9s. in the name of Teed represented the share of Mrs. Rowlatt, deceased, which was paid to her husband and representative.

John Teed Luscombe made an affidavit for the defendants. He said that Mr. Teed was the acting executor; that soon after 1844 he, the deponent, borrowed £500, and in October, 1846, £300 more from the trustees; that the loans were made with the consent of Mrs. Payne, Mrs. Rowlatt, and his mother; that the policies were allowed to drop; that the £815 1s. 5d. was divided into fourths, one of which was paid to Mrs. Rowlatt, and the other three applied in payment of debts of the family, who then lived altogether. He recognized many of the names in the copy of the ledger produced as those of shopkeepers at Plymouth at that date.

361] *Mr. *Swanston*, Q.C., and Mr. *Freeman*, for the plaintiffs: The rule is clear that trustees who neglect to account must pay the costs to the hearing: *Springett v. Dashwood* (¹); even where the account is substantially correct.

Here it is plain from the defendant's own evidence that the plaintiffs' share was swept away in payment of debts for which the female plaintiff was not liable; and the securities that were taken were absolutely worthless. Breaches of trust committed by relatives are always viewed by the court with especial displeasure.

Mr. *Kay*, Q.C., and Mr. *Badcock*, for the defendant Evens: Every presumption is made in courts of equity against a stale claim. If the evidence is not of the best kind, it is precisely owing to the staleness of the claim. Here the testator died in 1832, and the bulk of the property was distributed so long ago as 1847.

As to the whole of the property except the £815, written authority is produced: and the plaintiff actually sued her brother on the bond.

The letter was procured by the brother, not by the trustees of the fund; and it was impossible for the executors to refuse to act on the request.

Knowing of the bankruptcy of the brother, the plaintiffs make no claim until after Mr. Teed's death.

Mr. *Jackson*, Q.C., and Mr. *Thomas Lean Wilkinson*, for the defendant Mrs. Teed.

On the question of presumption, they referred to *Lewin on Trusts* (²); *Pattison v. Hawksworth* (³).

Mr. *Swanston*, in reply.

SIR JAMES BACON, V.C.: It must be admitted that this is a very singular case, and in my experience I do not recollect one like it. No doubt the court acts with strictness and rigor against trustees, because it requires for the public in-

(¹) 2 Giff., 521.

(²) 4th Ed., 567.

(³) 10 Beav., 375.

terest that the duties assumed by trustees should *be [362 discharged with the utmost punctuality and regularity. When trustees have failed in these duties, and wrong has been done in consequence of that failure, the court is in the habit of visiting the trustees with severity; but I never heard of a case in which, after such a lapse of time as has taken place here, and after such transactions as are here clearly proved, the rule against trustees has been applied as if they were still trustees, still holding in their hands funds, and still liable to account.

In the year 1832 a testator dies leaving a widow and four children. The property is collected, as appears by the answer of the defendant, which is not questioned, and it consisted of a sum of about £1,600, divisible into fourths among the children. Two of the children received their shares—that is clear—John Teed Luscombe and another. There remained a sum of £800 invested in the funds. At that time—I speak now of the year 1847, when the present plaintiff was adult, when she was living with her mother and her grandmother, and when she had the protection of her uncle, the late Mr. Teed—a sum of £800 was ascertained to be the sum to which she and her sister, and her mother for a life interest, were entitled—that and no other; and I think it would be against all the rules which the court has applied to the doctrine of presumption to presume anything but that at that time the estate was administered, all that could be realized was realized, and £800 of stock was all that the plaintiff could claim to have any interest in. Well, that £800 is dealt with, as appears by the evidence, in the plainest and most distinct manner. The family were desirous that John Teed Luscombe, who was then a young man beginning business, should have the benefit of that sum. He had borrowed £500, and he wanted £300 more, which would exhaust the fund. The trustees were asked to advance it. Mr. Teed, who, as we all know, was a lawyer, pointed out the difficulties of advancing the trust money to John Teed Luscombe upon personal security, and that it could not be done except with the consent and at the request of the persons entitled, and that consent accordingly was readily given. The evidence of this is in writing, and it is one of the most satisfactory pieces of evidence ever produced. The security taken for it was that which the plaintiff herself prescribed—namely, a bond. She takes the bond; *she sues upon it; she does not get [363 the money, as it happens, by the failure of her brother, but she treats that £800 as a payment made by her direction to John Teed Luscombe, for securing the repayment of which

she took a bond. That was in the year 1847, and there is no suggestion that from that time any single item or fraction of the testator's estate, of which estate Mr. Evens is the surviving trustee, was in existence. No application is made in respect of it until the institution of this suit, and yet I am asked to presume that, because one trustee has not now forthcoming accounts and vouchers, he has committed that default which this court visits, when the trustee withholds his accounts, or does not present them at the proper time, not only with liability, but by making him pay the costs up to the hearing. There was never such a case presented to the court, and so to hold would be in direct violation of the rules always acted upon, and directly opposed to everything like common honesty—I had almost said common decency.

The bill is filed asking for two things—general administration of the estate, and relief in respect of a sum of £815, which are subject to separate considerations. The bill makes scarcely the slightest allusion to the general estate, stating, in the way of pleading only, that the testator died leaving enough to pay all his debts, that they have been paid, that the plaintiffs have from time to time received from the executors of the will small sums on account of one fourth share to which the plaintiff, Mrs. Payne, became entitled under the will, and then it asks that the real and personal estate of the testator may be administered. When the answer is put in a totally different state of circumstances is presented. The winding-up of the general estate is stated in the answer, and is, I think, sufficiently proved so that the court can act upon it. There is no amendment of the bill. There is not one word said about the £800 stock, which was a part of the general estate. The bill undergoes no amendment that I know of, but it stands upon the answer with a full and distinct explanation of the transaction as to that £800, the stock for which the bond was given.

Then the other thing to be considered is this trust sum, as unquestionably it was, of £815, which in 1855, by the death 364] of an *annuitant, became distributable, and to a share in which the plaintiff was entitled. Upon that subject there is a piece of evidence which is as satisfactory, or perhaps more so, than anything else in the case—I mean the evidence of John Teed Luscombe. Mr. Teed is dead. The bill is not filed until after Mr. Teed's death. During his lifetime, as he had, it is clear, the principal management of this affair, information might have been given which now it is impossible to arrive at. But Mr. John Teed Luscombe says this: "I have been familiar with the matter of this

trust for many years. Mr. Evens was an acting trustee, as was also Mr. John Godfrey Teed, who I have no doubt was consulted by Mr. Evens in everything he did as trustee." Then he says: "No step was taken in the affairs without consulting Mr. Teed. . . . I was admitted a solicitor in Michaelmas Term, 1844, and soon after my admission I borrowed from the trustees £500, and in October, 1846, a further sum of £300. These loans were made with the consent of the plaintiff, Mrs. Payne, one of my sisters, of Mrs. Rowlatt, my other sister, and also of my mother, Mrs. Luscombe." Then he says it was secured by two policies of insurance and his own bond, and that is all he says upon that subject. But as to the £815 he says this—that it "was received by the trustees in 1855. The dividends of the stock afterwards sold, and which produced this £815 1s. 5d. cash, were applied in payment of the annuity of £20 to Mrs. Soper during her life, and the surplus was paid to my mother. After Mrs. Soper's death the whole of the dividends were received by my mother, and the £815 1s. 5d. was received by the trustees after my mother's death in 1855." [The plaintiff says she did not know of the death of Mrs. Soper.] "It was divided into four shares—one was paid to Mr. Rowlatt, and the remaining three-fourths were applied in payment of certain debts due at Plymouth, with my consent and the consent of the plaintiff and my sister Caroline, who is now dead. These were debts owing from the family. My mother, grandmother, and my two sisters, Mrs. Payne, who was then unmarried, and Caroline, kept house in Plymouth together. The plaintiff herself (Mrs. Payne) told me that she received a portion of this three-fourths, which I understood at the time was the balance left after payment of these debts. Mrs. Payne has since expressed her regret that the money was so applied. *The payments [365 were made by checks. Some of the payments I made myself. There was one check for £100 drawn by Mr. Evens in favor of 'self,' which I have no doubt was applied in payment of the claims of smaller creditors, and in the payment made to Mrs. Payne. The account at the bank was in Mr. Evens' name. I handed checks for the amounts due to Hicks, Radford and Pollard, appearing in the second column of Exhibit D to the aforesaid affidavit. On looking at the said column I recognize the names of persons with whom my mother's family dealt, namely, Shephard," &c. (Then he gives them.) "My mother and sisters were in narrow circumstances in Plymouth. The plaintiffs have always been in needy circumstances." It cannot be dis-

puted that the facts stated in that deposition which I have been reading are strictly and clearly in evidence. The plaintiff herself calls Mr. John Teed Luscombe to make an affidavit, and in that affidavit he qualifies in some degree what he had said about the loan of £500. He says, "I am not aware whether the loan of £500 from Messrs. Teed and Evens, the trustees of my late father's estate, to myself in 1844, was made with the written consent of the plaintiff Helling Louisa Payne, but I understood that it was made with her consent. As to the £815 1s. 5d. received by the trustees in 1855, I consented for my share thereof to be applied in payment of certain Plymouth debts due from my grandmother and mother. I understood that the plaintiff Mrs. Payne also consented for her share to be similarly applied, and that she received some small balance; but this she has since denied" (when, he does not suggest). "I do not believe any written consent was ever taken from any one."

Then he says: "As to the check for £100 drawn by Mr. Evens in favor of 'self,' I do not know how this was applied; although I was informed by him that it was applied in payment of small debts of my grandmother and mother, as stated in my depositions, but he stated he had no receipts. The plaintiff Mrs. Payne, so far as I know, never had any account whatever from the trustees as to the application of the £815 1s. 5d., and I do not believe any account was ever rendered to her until after the institution and during the progress of the suit. Mr. Teed made an allowance to his mother, but which was not regularly paid, and which was, I believe, considerably in arrear at the time of my mother's 366] death; *and this was the cause of some of the Plymouth debts being unpaid in April, 1855."

Now I have to deal with that as evidence; and upon this statement of a member of the family, who was himself cognizant of all that had taken place in the administration of this estate, can I hesitate to believe that it is sufficiently proved, so as to defeat any claim now made by the plaintiff, that the £815 was applied duly? I say "applied," because it was applied with Mrs. Payne's consent, though she has some doubt whether it was applied in such payment as appears by the evidence; and then John Teed Luscombe, who knows well enough that it was applied in payment of the debts which had been contracted in the common housekeeping of the grandmother, the mother, and the two daughters (although he afterwards says in his affidavit that they were debts due from the mother and grandmother), states that which, in my opinion, strengthens the presumption extremely,

namely, that the family were all in narrow circumstances, all in great need, and all pressed by their creditors; and that if the £815 had not been applied as it was, it would have been much the worse for all of them. That part of the case is clearly and satisfactorily proved for the purposes of the suit.

Then I have to deal with the question of what presumption ought now to be drawn in a case of this sort? It is impossible to presume otherwise than that from 1847 the plaintiff was satisfied that, by getting the bond, she had her full share of her father's estate as far as it was then administered. As clearly is it proved by John Teed Luscombe, who is her own witness for certain purposes, although the affidavit speaks more faintly than the deposition does, that the £815 was duly applied as to the share of Mrs. Rowlett. There is no doubt about it. As to the rest, it is proved as well as at this distance of time it can reasonably be required to be proved; and under these circumstances I am asked, after this lapse of time, to take an account that must begin in the year 1832, forty years ago; and further, of an estate which I am satisfied ought to be presumed to have been wound up and settled at least in the year 1847; and I am asked to direct a more special account as to the £815, in the face of the female plaintiff's own evidence that the £815 was for paying debts as to which, if she was not liable, she was mainly interested; and I am asked to do that at *the [367 suit of a plaintiff who was married in 1857, the money having been lent in 1847, and the bill not being filed until after Mr. Teed, who was the only person who really managed this matter, or could give satisfactory evidence upon the subject, is in his grave. A more unreasonable and unjust demand than that which is preferred by this suit never was presented to the court, and I think the bill must be dismissed.

I cannot, however, dismiss it with costs, but only for this reason, that although I am satisfied as to the transaction of 1855, and satisfied that the presumption is in favor of the defendants, yet I cannot say that it was not the duty of the trustees to preserve evidence of that distribution in 1855; and as they have neglected to do that, unfortunate as it is for them, I cannot compel the plaintiffs to pay the costs of that negligence which alone has allowed color to be given to the institution of this suit.

Solicitors for the plaintiff: Messrs. *Makinson & Carpenter*, agents for Mr. *Burrow, Collumpton*.

Solicitors for the defendants: Messrs. *Vizard, Crowder & Anstie*, agents for Mr. *W. F. Burrell, Gosport*; Messrs. *Sharp & Ullithorne*.

[Law Reports, 18 Equity Cases, 375.]

C.J.B., May 25, 1874.

375] **Ex parte* BOSS. *In re* WHALLEY.*Debtor's Summons—Bankruptcy Petition—Offer of Debtor to pay—Creditor's Right to Adjudication—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), ss. 8, 9, 80, subs. 10.*

After a bankruptcy petition has been presented, and before adjudication, the petitioning creditor is not bound to accept payment, although, *semble*, he is at liberty to do so, but is entitled to insist upon an adjudication on proving his debt and the commission of an act of bankruptcy; and this as well in the case of an act of bankruptcy under a debtor's summons as in any other.

THIS was an appeal from a decision of the Registrar of the Wrexham County Court, acting as judge.

On the 3d of November, 1873, a debtor's summons was issued by Mr. Albert Boss against Mr. Hampden Whalley (a non-trader), claiming the payment of £75 9s. 6d. for principal and interest due upon a bill of exchange accepted by Whalley. The summons was served personally upon Whalley, and he committed an act of bankruptcy by not paying the sum claimed, or securing or compounding for it within twenty-one days. On the 29th of November, 1873, Boss presented a petition for adjudication of bankruptcy against Whalley. The debt alleged in the petition was the sum claimed by the debtor's summons, and the act of bankruptcy alleged was the failure to comply with the summons. On the 13th of December an order was made by the County Court for substituted service of the petition, on the ground that Whalley was keeping out of the way to avoid service, and the 2d of February, 1874, was fixed for the hearing of the petition. On the 3d of February, 1864, on the application of the petitioning creditor, the day for the hearing of the petition was postponed to the 31st of March. Negotiations had been going on between Boss and the father of the debtor (who was a young man about twenty-two years of age) for the payment of the debt claimed. On the 31st of January, 1874, a clerk of the debtor's solicitor went to the office of the solicitors of Boss and offered to pay the amount claimed with interest and costs. Both the partners in the firm were then absent, 376] but one of them, later in the same day, called *at the office of the debtor's solicitor, and asked whether he was prepared to pay the amount of some other bills accepted by the debtor and held by Boss, as well as the sum mentioned in the petition. To this inquiry the clerk of Whalley's solicitor answered that his instructions had reference only to the pending proceedings. Boss's solicitors there-

upon declined to accept the tendered payment, and said that as an act of bankruptcy had been committed their client would insist upon an adjudication being made, unless the claims he had in respect of the other bills were satisfied. On the 31st of March the petition came on to be heard. Evidence was given of the petitioning creditor's debt and of the act of bankruptcy, and an adjudication was asked for, and the Registrar was informed that there were other debts due from Whalley to Boss besides the debt mentioned in the petition. Whalley's solicitor offered to pay the debt mentioned in the petition and costs. The Registrar thereupon made an order that, on payment to Boss within one month of the £75 9s. 6d. with interest, together with the taxed costs of the proceedings in bankruptcy, the petition be dismissed, and all further proceedings thereon be stayed. From this order Boss appealed.

Mr. De Gex, Q.C., and Mr. Robertson Griffiths, for the appellant: Under sect. 8 of the Bankruptcy Act, 1869, the petitioning creditor has a right, *ex debito justitiæ*, to an adjudication, upon proof of a debt of not less than £50, and of the commission of an act of bankruptcy by the debtor within six months: *Ex parte Claxton* (*). He is not bound to state on his petition every debt which is due to him from the debtor. It is sufficient that the requisites for an adjudication exist when the petition is presented: *Ex parte Douthat* (*). In *Ex parte Burnett* (*) it was held that a joint creditor who had sued out a separate fiat was entitled to receive dividends on his joint debt out of the separate estate *pari passu* with the separate creditors, notwithstanding the fact that there was also due to him from the bankrupt a separate debt sufficient to support a fiat. In *Ex parte Thompson* (*) a creditor, who, upon receiving his debt, [377 superseded a commission without application to the court, was ordered to refund. Upon the same principle, in *Davis v. Holding* (*), an agreement between a petitioning creditor who had sued out a fiat and the bankrupt, that the former should abandon the prosecution of the fiat on certain terms, was held to be illegal and void. A bankruptcy petition is a proceeding for the benefit of all the creditors of the person against whom the petition is presented: *Ex parte Jay* (*).

Mr. Winslow, Q.C., and Mr. E. Cutler, for Whalley: Why cannot the debtor pay and the creditor receive the debt at any time before an order for adjudication is made

(*) Law Rep., 7 Ch., 532.

(*) 4 B. & A., 67.

(*) 2 M. D. & D., 357.

(*) 1 Ves., 157.

(*) 1 M. & W., 159.

(*) Law Rep., 9 Ch., 133.

on the petition? The only act of bankruptcy alleged is non-compliance with a debtor's summons, an act of bankruptcy of which only the summoning creditor can avail himself: Bankruptcy Act, 1869, s. 6, subs. 6. The legislature, when it passed that act, at the same time abolished arrest for debt, and it extended the summary procedure, by way of debtor's summons, to all persons, it having been originally applicable only to traders. When payment of the debt mentioned in the petition was tendered the creditor had no right to insist on an adjudication. Sect. 8 of the act gives the court a discretion to dismiss the petition; and, by sect. 9, if the debtor disputes the debt the court may stay proceedings pending the trial of an action at law, upon security being given "for payment to the petitioner of any debt which may be established," against the debtor. What would be the use of this provision, if the argument on the other side is sound, that after the petition is presented the debtor cannot pay and the creditor cannot receive the debt? The court is bound to stay the proceedings if the debt is disputed. Why is the debtor at liberty to pay the debt in that case, but unable to pay it if he does not dispute it? If that be so, he would only have to swear the debt was not due, and then when an action was brought to try the question he could consent to a judgment against him and pay. The Bankruptcy Rules, 1870, rr. 43, 44, refer only to the debt mentioned in the petition, and the form of "Bond on stay of proceeding" (No. 19 in the Schedule to the Bankruptcy 378] Rules, 1870) only *provides security for payment of the particular debt claimed in the petition or debtor's summons. In *Ex parte Jay* ⁽¹⁾ a receiver had been appointed, and that was the ground of the decision. The judgment of Lord Selborne is quite in accordance with our contention. The judgment of Lord Justice Mellish in *Ex parte Wier* ⁽²⁾ implies that a creditor whose petition is founded on a debtor's summons may receive payment of his debt after the petition is presented. In the present case the first tender was made before the petition was served, and the debtor had a right to insist on the creditor receiving the money. In *Ex parte Sturt & Co.* ⁽³⁾ your honor said: "Former acts of Parliament relating to bankruptcy are mere matters of history, and are swept entirely away by the present act." By sect. 80, sub-sect. 10, of the present act, the court may at any time stay proceedings in bankruptcy on proof of any sufficient reason for doing so, and on such terms as it may

(1) Law Rep., 9 Ch., 133.

(2) Ibid., 6 Ch., 875, 880.

(3) Law Rep., 13 Eq., 309.

think just. *Ex parte Burnett* (') has no application to the present case.

SIR JAMES BACON, C.J.: I am of opinion that the view taken in the court below was not the correct one. The case is an extremely simple one. A petition for adjudication is presented by a creditor who had previously issued a debtor's summons for a debt larger in amount than £50. That is how the proceedings are launched. It is incumbent upon the creditor to show that not less than £50 is due, but there is no law which prevents him from showing that a much larger debt than the amount mentioned in the petition is in fact due to him. So the matter stands; the evidence of the service of the debtor's summons appears to be complete (I have heard no suggestion to the contrary), and, as a consequence, the act of bankruptcy was complete at the expiration of the period limited by the statute for a debtor to pay, secure, or compound the sum specified in the debtor's summons. For various reasons, the hearing of the petition was adjourned until the day when the order now under appeal was made. Upon the hearing the creditor desired that an order of adjudication should, on the grounds specified in the 8th *section, be made. That section prescribes [379 that, "At the hearing the court shall require proof of the debt of the petitioning creditor, and of the trading, if necessary, and of the act of bankruptcy, or if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with such proof, shall adjudge the debtor to be bankrupt." Can anything be more clear and distinct than that? It is the right of the creditor, upon proving those requisites—his debt and the default in payment, which constitutes an act of bankruptcy—to call for an adjudication. The section goes on to provide: "The court may adjourn the petition, either conditionally or unconditionally, for the procurement of further evidence, or for any other just cause, or may dismiss the petition, with or without costs, as the court thinks just." That means that if the judge is not satisfied with the evidence, he may adjourn the hearing, or he may dismiss the petition, such an order, like all other orders, being the subject of appeal. It has been argued very forcibly that, as the law now stands, it is competent for a creditor to receive the debt in respect of which he attacks the debtor, and be free from all the penalties and liabilities which formerly attached to his doing so. This may be true, but there is nothing in the act of 1869 or in the policy of the law which renders it incumbent upon

(') 2 M. D. & D., 357.

the creditor, after an act of bankruptcy committed by the debtor, to receive payment of his debt. Even if it is tendered to him, he may say: "I will not accept the money tendered to me, but I will, for reasons which seem good to me, prosecute the law against you; for, in the period limited by the statute, you might have paid the debt or have disputed it, and then, upon your giving security, the proceedings might have been stayed; but you have allowed the time for doing that to go by." Here, however, the evidence on the subject of what is called the tender is very unsatisfactory. The tender was made by one clerk to another, but the clerk to whom the tender was made was not competent to deal with the subject; and on a subsequent occasion the same proposition was made. But the debtor's agent is told plainly that the debt mentioned in the petition is not the only debt which the creditor, by means of the proceedings in bankruptcy, is desirous of enforcing; and in that state the matter remains until it comes before the Registrar, when 380] *the order appealed from is made. The Registrar, being satisfied that an intention existed on the part of the debtor to pay the debt, gave him time to pay it. But what authority had he for doing so? If I were to admit the validity of Mr. Winslow's argument, it would be in the power of a debtor to stop proceedings and avert the bankruptcy, after committing an act of bankruptcy, upon tendering the debt. But what was the state of the proceedings before the Registrar? There was an act of bankruptcy committed, and no valid tender had been made to the creditor, but there was only a promise to pay. The Registrar could only do that which the 8th section points out. He could require proof of the existence of the debt; he could require proof of the act of bankruptcy. Both these things were proved before him. Then, after commission of an act of bankruptcy, the debtor says, "I tender the amount of the debt, and if you will give me time I will pay it;" and the Registrar, instead of pronouncing judgment, gave time for payment, and adjourned the petition. I do not think he had any authority to do this. The cases which have been cited mostly relate to a bygone state of things. *Ex parte Jay* ⁽¹⁾ decides nothing on the present question. The distinction was there taken between a case where a receiver had been appointed and a case where that had not been done, and where, therefore, the creditor would be at perfect liberty to receive payment of his debt. That case, therefore, has no application to the one before me. The simple question before me is, whether

(1) Law Rep., 9 Ch., 183.

the debt and the act of bankruptcy having been proved, and the creditor desiring to have an adjudication made, it is competent for the judge to say, "I am so satisfied that the debtor is ready to pay, that I give him a fortnight's time to do so," that time being afterwards enlarged to a month. In my opinion there was no ground whatever for such an order, and it must be discharged. The case must go back to the County Court, and the proceedings must be continued as if no such order had been made.

Solicitors: Messrs. *Beyfus & Beyfus*; Mr. *C. B. Hallward*.

[Law Reports, 18 Equity Cases, 381.]

C.J.B., June 8, 1874.

**Ex parte PARKE. In re POTTER.* [381]

Landlord and Tenant—Rent—Distress—Tenants in Common—Attornment—Chattels in Joint Possession—Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 34.

Two tenants in common mortgaged an estate to secure a debt which they jointly and severally covenanted to pay, and each of them separately attorned tenant to the mortgagees of a part of the estate of which they were jointly in occupation, at a rent equal to half the annual interest on the mortgage debt. The mortgagors were partners in the business of brickmakers, which they carried on upon that part of the estate which was in their joint occupation:

Held, that the mortgagees could not distrain for the rent upon the partnership property which was on the estate.

THIS was an appeal from a decision of the judge of the Croydon County Court.

By a deed of mortgage, dated the 29th of August, 1867, Henry Potter and William Ferrige conveyed certain hereditaments, to which they were entitled in undivided moieties as tenants in common, to C. J. Parke, H. Hutchings, and Thomas St. Leger Alcock, in fee, by way of mortgage to secure the repayment of £2,000, with interest at 5 per cent., which sum was expressed to be lent by the mortgagees to the mortgagors jointly. The deed contained a joint and several covenant by the mortgagors for the payment of the £2,000 with interest, and also the following attornment: "He the said Henry Potter doth hereby attorn and become tenant from year to year to the said C. J. Parke, H. Hutchings, and T. St. Leger Alcock, their heirs and assigns, for and in respect of one equal undivided moiety of such parts of the premises hereinbefore expressed to be hereby granted as are mentioned in the schedule hereto to be in the occupation of the said Henry Potter and William Ferrige, at the yearly rent of £50, to be paid by equal half yearly payments." There was a similar attornment by Ferrige in respect of the

1874

Ex parte Parke. In re Potter.

C.J.B.

other undivided moiety of the premises in the occupation of Potter and Ferrige, at a similar rent of £50.

Potter and Ferrige were partners in the business of brick-makers, and that part of the mortgaged premises which was in their joint occupation was used by them for the purposes 382] of their trade. The *interest on the mortgage being in arrear, the mortgagees, on the 10th of February, 1874, issued two separate distress warrants against Potter and Ferrige. The warrant against Potter authorized and required the bailiff "to distrain the goods and chattels of H. Potter on the premises in the possession of the said H. Potter and William Ferrige, situate at Sutton, for £300, being six years' rent due to us by the said H. Potter for his one equal undivided moiety of the said premises on the 31st December, 1873, and to proceed thereon for the recovery of the said rent as the law directs." The warrant against Ferrige was in a similar form. Under these two warrants the bailiff seized certain bricks and machinery which were the joint property of Potter and Ferrige as partners. On the 13th of February Potter and Ferrige were adjudged bankrupts. On the 16th of February the goods seized were appraised. On the 17th of February, on the application of a receiver appointed in the bankruptcy (who afterwards became trustee), an interim injunction was granted to restrain the mortgagees from proceeding upon their distress, and this injunction was afterwards made perpetual, the judge being of opinion that the mortgagees were only entitled to a qualified right of distress for each rent on the goods of that tenant in common out of whose moiety such rent was reserved. The proceeds of the goods, which had been sold by arrangement, were ordered to be paid to the trustee. The mortgagees appealed.

Mr. Winslow, Q.C., and Mr. Oswald, for the appellants: In *Viner's* Abridgment, 'Distress' (1), it is said: "If there are several joint tenants, and one grants a rent-charge out of the land, the grantee may distrain the cattle of the grantor. But he cannot distrain the cattle of the other joint tenants. But he may distrain the cattle of a stranger that come upon the land." To the last proposition, however, is added "*Quare.*" *Bradby* on Distress (1) repeats the same proposition. If one of two joint tenants, with the assent of the other, makes a lease of the whole land, it is a good demise by both: *Viner's* Abridgment, 'Joint Tenants' (1). *A fortiori*, the two tenants in common in the present case are bound, each having granted all his own interest in the land. 383] *The presumption is that each of two partners is en-

(1) I. 25, 26, 27.

(1) 2d Ed., pp. 41, 76.

(2) U. 4.

titled to a moiety of the partnership property. If they are joint tenants, neither of them can say that the property seized under the distress is not his property; and we are entitled to say, "Half is seized for your debt, and the other half for your partner's debt." If they are in the position of strangers to each other, then of course we can seize their goods on the land. The partners, being privy to the attornments, chose to bring the partnership property on the land, and they cannot complain if it is seized under a distress for rent. Each of the parties to the deed is estopped from denying his liability to the rent reserved on the attornment of the other: *Cooper v. Fletcher* ⁽¹⁾; *Morton v. Woods* ⁽²⁾. The intention here was to secure the payment of a joint debt, for which the parties made themselves jointly and severally liable. In equity they are tenants of the goods in common, just as they are of the land. *Kempe v. Cory* ⁽³⁾ does not apply, since both tenants in common are parties to the deed.

Mr. Benjamin, Q.C., and Mr. E. C. Willis, for the trustee: Suppose one of the tenants in common had paid his rent, and the other had not, what could the appellants have seized under a distress then? A distress differs from a seizure under a writ of execution, in that it is of its essence that you can take the thing seized and carry it away: *In re Fanshaw* ⁽⁴⁾. It is clear from *Kempe v. Cory*, that where there is a lease by a joint tenant of his part, the cattle of the other joint tenant, or those of a stranger put in by his license, are not distrainable. The warrants of distress in the present case are in the proper form, and show the exact extent of the right, namely, to seize the property of the person against whom it is issued. The only authority in favor of the appellants is the *dictum* in *Viner* as to the cattle of a stranger, and for that there is no authority. If the appellants are to succeed, it will be because they can seize, not the goods, but the interest of each partner in them. Two such interests will not make up a chattel.

*Mr. Winslow, in reply: If one of the tenants in [384 common had paid his rent, still, as he was privy to the attornment by the other, he could not complain if his goods were seized under a distress. The principle of what is said by *Viner*, as to the lease of one joint tenant with the assent of the other binding both, applies to this case. There is no difference between joint tenants and tenants in common with regard to the possession and manner of taking the

⁽¹⁾ 6 B. & S., 464.

⁽²⁾ 2 Vent., 227, 283.

⁽³⁾ Law Rep., 3 Q. B., 658; *Ibid.*, 4 Q. B., 293.

⁽⁴⁾ Law Rep., 11 Eq., 615.

profits of the land : *Pullen v. Palmer* ('). No injustice can be done ; the objection is a purely technical one ; the object of the attornments was to enable the joint assets to be applied in paying the joint debt. *Pinhorn v. Souster* (') shows that a stranger's goods could be seized under such an attornment.

SIR JAMES BACON, C.J.: A more ridiculously technical case than this can hardly be conceived at the present day. If I may use the word "ridiculous" with regard to any point of law which is merely technical ; but it is a most purely technical point. If I could introduce into my decision, or if I could enter into the contemplation of, what are called equitable principles, or principles of common justice and common sense, I should have no hesitation whatever in saying that both these distresses were perfectly good distresses upon the chattels which were taken. But the law forbids me ; the contract and the conduct of the parties prevent me from saying so.

Each attornment constituted the relation of landlord and tenant between one of the mortgagors and the mortgagees as to one undivided moiety of the premises comprised in the mortgage deed, and the right of distress is a consequence of the attornment. The right of distress is (to take the case of Potter) to distrain upon all or any of the chattels of Potter that can be found upon the land, and to take them, without process, without authority, other than that which the deed and the law gives to the distrainor, and to carry them away. I do not say that the power of carrying them away is conclusive of this case, but he has a right to lay hands upon the chattels. Now I should like to know how it can be said that, in exercising his right to distrain upon the goods of Potter, 385] he could *take away a brick in which at law Potter and Ferrige are jointly interested, and in which, in equity, Potter may have no interest whatever ; because, if it be joint property, first of all it is subject to the payment of the joint debts, and, until the partnership obligations have been satisfied, nobody can say what is the interest of either partner in the chattels ; so that, practically, not only you cannot point to any one of these chattels and say it belongs to Potter, but you cannot even satisfy yourself that he really has such an interest in it as would make it liable to the debt due to the landlord.

The authorities which have been referred to do not, in my opinion, in the slightest degree touch this case, except that *dictum* upon which Mr. Winslow very properly relied, that

(') 3 Salk., 206.

(') 8 Ex., 763.

cattle of a stranger being upon land which is held in joint tenancy may be distrained for rent due from one of the joint tenants. I cannot follow that *dictum*. Before I could adopt it as an exposition of the law I must find it distinctly stated, and have the authority of some decided case for it. I can see reasons against it. For the stranger, the owner of the beast which the landlord wanted to distrain, would say, "You cannot say that my beast is upon Potter's land; show me which is Potter's land. It is no more one inch or one yard of this field than another, and the onus is upon you to show that this beast, of which you want to possess yourself in order to pay Potter's debt, is upon Potter's land, for it is only upon that condition that you can take it." That would be utterly impossible. The contract between the parties, and the law which follows upon the contract, give the landlord a right to take everything upon the entire estate which belongs to Potter. He may roam over the whole of the joint estate, and if he can find a horse, a sheep, or any other chattel with regard to which the title of Potter can be plainly made out, he has a right to take it.

It is a totally different question whether he has a right to take chattels in which Potter, if he has any interest, cannot have more than half at the most. It would be directly against the contract, and it would be directly against the law, to say that this creditor may come in and take another man's property to pay Potter's debt.

I do not in the least forget that it is in a certain sense a joint debt; there are the two rents, both of the mortgagors owe a debt, *and the property belongs to both of [386 them in some sense or another. But I cannot resort to that consideration for the purpose of deciding the present question. I must treat these debts as if they were totally and entirely distinct and apart, and every reason which I have been considering why the mortgagees cannot distrain as regards Potter's debts on anything but Potter's separate estate or chattels applies also to Ferrige. You can do no more in the one case than in the other. The landlord had a right, as I have said, to lay his hands upon and to remove everything that was Potter's, that is to say, everything that Potter could remove. But Potter could with no justice remove these bricks. They were partnership property, and he could not take them away; if he did so he would be doing a wrong thing, for his position as partner would not give him any right so to deal with them.

The distress must be limited to chattels which belonged to Potter and Ferrige respectively, and in seizing these bricks

I think the mortgagees have exceeded the right of a landlord to distrain the chattels of a tenant in common of the lands in question. He may take everything he can find belonging to the person against whom each warrant is issued. If he can find a brick that belongs to Potter he may take it; but if he tries to take a brick in which there is any joint ownership, he exceeds his legal right. He must not take anything that belongs to Ferrige, and he cannot take the joint property without taking something that does belong to Ferrige. I come to this conclusion reluctantly, because it is directly against the common sense and justice of the case; but as I feel satisfied it is according to law, I have no option but so to decide. I am of opinion that the order of the learned judge of the County Court must be affirmed.

Mr. *Benjamin* : The appeal will be dismissed with costs?

SIR JAMES BACON, C.J. : I think it is a case in which I ought not to dismiss the appeal with costs, for the question was worthy of consideration, worthy of the learned arguments which I have heard from Mr. Winslow and Mr. Benjamin, and I think in all fairness there should not be any order as to costs.

Solicitors : Messrs. *Chauntrell & Pollock* ; Mr. *W. Foster*.

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A

ACCEPTANCE.

See FRAUDS, STATUTE OF, 727.
MORTGAGE, 94.

ACCOUNT.

See TRUST AND TRUSTEES, 858.

ACKNOWLEDGMENT OF DEED.

1. The affidavit verifying the certificate of an acknowledgment taken by special commissioners in the East Indies left a blank for the place of abode of one of the commissioners; but, as the affidavit stated that he was "the other commissioner in the said certificate mentioned," the court allowed it to pass.

The affidavit was not signed by the deponent. The jurat, however, stated that it was sworn before a magistrate and justice of the peace (who duly described his office or authority) by the deponent:

Held,—upon the authority of *Re Eady* (6 Dowl. 615) and Reg. Gen. Hilary Term, 1868,—that the defect was cured. *Matter of Howard*. 436, 448 *note*.

ADJOURNMENT.

See CRIMINAL LAW, 323.

ADMIRALTY.

1. When the employment of a pilot is within the provisions of s. 139 of the Mersey Docks Consolidation Act, 1858, such employment is compulsory.

2. The object of the master, when the vessel left the dock, was to get to sea as soon as he could, and he arranged with the pilot that the vessel should anchor in the Mersey for the night, but should go so far on the way as would enable her to cross the bar on the next morning's tide:

Held, that the ship was proceeding to sea within the meaning of s. 139 at the time she left the dock, and that the anchoring was not a discontinuance of her progress to the sea, but an act proper and reasonable to be done in the course of it.

3. The 138th section of the act does not relate to the giving of extra remuneration to those pilots only who are voluntarily engaged.

4. It may happen that a pilot who is compulsorily engaged under the 139th section of the act by a ship proceeding to sea, may, by the ship's detention in the river, become entitled to extra remuneration under the 138th section. *Wood v. Smith*. 256

5. Where a petition on protest is filed on the ground of want of jurisdiction, before the plaintiff's petition setting forth the particulars of his damage, the petition on protest ought to state the facts which show want of jurisdiction.

6. The general words of clause 6 of the Admiralty Court Act, 1861, "any claim . . . for any breach of contract on the part of the owner, &c., of the ship" have relation to the contract in the bill of lading.

7. Where the parties contemplated that the goods would, or at least might, be carried into and delivered in an English port, and it was so provided by the bill of lading signed by the master at Rangoon, in pursuance of a charter-party made in England, and the master in fact put into an English port for orders in part fulfilment of the contract of carriage; the jurisdiction, at least in re-

- spect of then existing causes of suit, arose when the goods were so carried into port, and was not taken away by the ship being subsequently sent to a foreign port to be discharged.
8. The 6th section of the Admiralty Court Act, 1861, does not confer a maritime lien. It only gives to the Court of Admiralty jurisdiction to entertain a suit either *in personam* or *in rem* by arrest of the ship whenever it comes within reach of process. The arrest cannot avail against any valid charge on the ship, nor against a *bona fide* purchaser.
9. The Admiralty Court Act, 1861, being intended to remedy a grievance, by amplifying the jurisdiction of the English Court of Admiralty, ought to be construed liberally, so as to afford the utmost relief which the fair meaning of its language will allow. *Dapuelo v. Wyllie*. 264
10. A charterparty was entered into in London on the 17th of June, 1872, between plaintiff, as master of a ship lying at London, and R. B. L., a ship-broker, to carry 407 tons of iron from H. to G., at freight of 7s. 8d. per ton. Freight to be paid in London on signing bills of lading, the owner or master to have an absolute lien for freight. On the following day L. chartered the ship to the defendant at 8s. per ton for the same amount of iron. The charter contained similar clauses as to freight and lien, and the following clause at the end: "The brokerage of 5 per cent. is due on the execution of this charter to R. B. L., by whom the vessel is to be entered and cleared at the port of loading." Though the defendant thought he was treating with L. as broker for the ship, L. had no authority in fact to act as broker for the plaintiff, or to receive the freight; and neither plaintiff nor defendant knew of the charter entered into by the other. The cargo having been put on board by defendant, the master signed bills of lading making it deliverable to consignees or assignes, "they paying freight for the said goods as per charterparty." The plaintiff did not demand the freight on signing the bills of lading. The cargo was duly delivered at the port of discharge; and in the mean time L. obtained payment of the freight of 8s. per ton from defendant, and afterwards stopped payment, leaving the 7s. 8d. per ton unpaid to plaintiff. The plaintiff having sued defendant for the 7s. 8d. per ton for the carriage of the iron:
Held, that the plaintiff could not recover: for that the plaintiff and defendant never were *ad idem*, and consequently there was no express contract between them; and that, under the circumstances, no contract to pay reasonable freight for the carriage could be implied on the shipment of the goods. *Smidt v. Tiden*. 379
11. Where the owner of a ship had an agent at the port where she was lying, authorized and ready to supply the ship's requirements:
Held, that the master had no implied authority to pledge the owner's credit at such port for necessaries supplied for the ship's use. *Gunn v. Roberts*. 423
12. Goods were shipped under a bill of lading in these terms: "Shipped in good order and condition by Petrochino Brothers, of Calcutta, in the steamer Zeno, bound for London, sixty-nine bales of hides, being marked and numbered as per margin, and to be delivered in the like good order and condition from the ship's deck, *where the ship's responsibility shall cease*, at the aforesaid port of London," &c., "on payment of freight," &c.
 On her arrival in London the Zeno went into the Victoria Docks, and notice was given to the consignees that she was ready to unload. The custom of the Victoria Docks as to the unloading of steamers was proved to be as follows: The goods are taken from the deck of the vessel by the company's servants and placed on the dock quay, or, if perishable, under sheds, and, if the consignee or his agent does not appear to claim them within twenty-four hours, they are warehoused by the company. If the consignee or his agent sends a lighter, they are put into the lighter from the quay by the servants of the company. The expenses of landing the goods and putting them into lighters are paid by the shipowner, but if the goods are warehoused, this is done at the expense of the owner of the goods.
 Within the proper time the consignees of the sixty-nine bales sent a lighter for them. The whole sixty-nine were

proved to have been landed by the company's servants and placed on the quay; but the evidence failed to satisfy the jury that more than sixty-eight were put into the lighter. The other bale was never traced:

Held, that the shipowner was not responsible for the missing bale. *Petrocchino v. Bott.* 448

ADVERSE POSSESSION.

See LIMITATIONS, STATUTE OF, 882.

AFFIDAVIT.

1. When omission of affiant or officer to sign vitiates. 436, 448 *note*.

AGENT.

See CRIMINAL LAW, 505.
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PRINCIPAL AND AGENT.

AGREEMENT.

1. A contractor does not agree that work may be done according to plan of engineer. *Thorn v. City of London.* 475

See ADMIRALTY, 379.
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AIR.

See LIGHT, 559.

ANIMALS.

1. A match took place between the owners of two dogs as to which could kill the greatest number of rabbits by running after them. The match took place in a field containing an area of three acres, 9 ENG. REP. 111

walled in so that the rabbits could not escape:

Held, That this was not baiting animals within the meaning of 12 & 13 Vict. c. 92, s. 3. *Pitts v. Millar.* 841

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APPEAL.

1. When point is waived in the court below it cannot be insisted upon on appeal. *Hilliard v. Eiffe.* 27

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APPORTIONMENT.

1. Bequest of stock in a canal company to trustees to pay the dividends to the testator's wife for life, and afterwards to fall into the residus:

Held, that the dividends were apportionable. *Pollock v. Pollock.* 840

ARBITRATION.

1. Where under an agreement, legislatively confirmed, the parties were bound to settle by arbitration all differences that might arise between them as to the meaning and effect of the agreement, or as to the mode of carrying it out, it was *held* by the House that the jurisdiction of the courts was, by this agreement, excluded, and that all disputes arising under it must be settled by arbitration.

Per the LORD CHANCELLOR: We have here no room for the application

of the doctrine as to voluntary agreements; but have simply to consider the case arising upon an act of Parliament, forcing the parties to have their disputes settled, not by the ordinary tribunals of the country, but by arbitration. *Caledonian, etc., v. Greenock, etc.* 191

ASSENT TO TERMS OF CONTRACT.

See ADMIRALTY, 379.

ASSETS.

See MARSHALLING ASSETS, 652.

ASSIGNMENT.

1. A. issued an attachment out of the Lord Mayor's Court against B. as garnishee, and C. (a native Indian merchant of Madras) as defendant, thereby attaching for a debt due to A., and contracted in this country, a fund belonging to C. in the hands of B. A's attachment was defeated by a prior attachment issued by D. for an alleged debt due from C., on which judgment was obtained in the Lord Mayor's Court.

The fund having been transferred from the Lord Mayor's into this court:

Held, that as D. had failed on the evidence to establish the validity of his alleged debt, his attachment was fraudulent, and the judgment based thereon inoperative, so that this court had jurisdiction to order payment to A. out of the fund in court of the amount of his debt, with interest from the date of his attachment in the Mayor's Court.

2. B. having a fund in his hands belonging to C.:

Held, that a bill of exchange drawn by C. on B. for the exact amount of the fund was not an equitable assignment. *Shand v. Du Buisson*, 803

See BILL OF LADING, 275.

DISTRESS, 495.

LANDLORD AND TENANT, 464.

ATTACHMENT.

See ASSIGNMENT, 803.

ATTORNEY.

See CRIMINAL LAW, 505.

ATTORNEY AND COUNSEL.

See MORTGAGE, 94, 114 note.

B

BAILEE.

See CRIMINAL LAW, 505.

BANKRUPTCY.

1. The sheriff having seized the goods of a trader debtor under an execution for more than £50, the debtor, before sale, paid him on the 18th of November and the 21st of November, two sums of £100 and £32 respectively, on account of the debt. The judgment creditors knew of and assented to the payments. The debtor, on the 24th of November, filed a petition for liquidation, and a restraining order was served on the sheriff, who continued to hold the sums so paid on account. Subsequently, on the 20th of December, trustees were appointed, who claimed the £132:

Held, that the judgment creditors, having assented to the payments, were entitled to the money as against the trustees. *Stock v. Holland*, 450

2. An execution levied by seizure and sale of a trader's goods for a debt exceeding £50, although an act of bankruptcy, is not for that reason necessarily a void proceeding; and if the execution creditor had no notice of a prior act of bankruptcy, and no notice of a petition for adjudication is given to the sheriff under the 87th section of the Bankruptcy

Act, 1869, within fourteen days after the sale, the execution creditor is entitled to the proceeds of the sale notwithstanding a supervening bankruptcy.

3. The sheriff may make a valid sale by private contract of goods seized under an execution, to the execution creditor.
4. If the sheriff sells goods seized under the same writ on different days, all the sales will be considered one transaction.
Matter of Villars. 531
5. After a bankruptcy petition has been presented, and before adjudication, the petitioning creditor is not bound to accept payment, although, *semble*, he is at liberty to do so, but is entitled to insist upon an adjudication on proving his debt and the commission of an act of bankruptcy; and this as well in the case of an act of bankruptcy under a debtor's summons as in any other.
Matter of Boss. 868

BILL OF EXCHANGE.

See PROTEST, 363.

BILL OF LADING.

1. A., a merchant in London and in Hong Kong, purchased goods for shipment from B., and paid for them by his acceptance of B.'s draft against the shipment, on the terms that A. should send them to his firm at Hong Kong, and that the proceeds should be remitted to A. in bills specially to meet such acceptance.

A.'s firm at Hong Kong owed a large sum to C., and were under engagement to secure the debt by depositing shipping documents with him. Being threatened by C. with immediate legal proceedings, they promised him that if he would forbear to take such proceedings, and would release them from their obligation to deposit shipping documents, they would deposit with him a bill of lading for goods of a certain value, upon the understanding that the bill of lading, or the goods represented therein, should be returned to them upon payment of a sum equivalent to the

value thereof. The bill of lading of the goods purchased from B. was accordingly indorsed to C., who had no knowledge of the terms made with B., and it was returned by C. according to agreement, on receipt of an equivalent sum:

Held (reversing the judgment of the Supreme Court of Hong Kong), that C. by such forbearance and release gave valuable consideration; that the legal interest in the goods passed by the indorsement of the bill of lading, and that B. could not enforce his claim against the proceeds of sale received by C. in respect thereof. *Bank of India v. Henderson.* 275

See ADMIRALTY, 264, 443.

BILLS OF SALE.

See CHATTEL MORTGAGE, 657.

BONA FIDE.

1. What is sufficient to put a purchaser or party making a payment on inquiry so he is not *bona fide* such, when notice of certain papers is of their contents, to what extent a *bona fide* purchaser is protected, when payment to agent good and when not, and what is sufficient to prevent becoming. 114 *note*.

See BILL OF LADING, 275.

DAMAGES, 116, 164 *note*.

MORTGAGE, 94, 114 *note*.

PRESUMPTION, 225, 255 *note*.

BONA FIDE PURCHASER.

1. In 1856, A. and B., being trustees of £7,000, invested it on mortgage of freeholds, of which C. was owner. The mortgage was negotiated by B., who was a solicitor, and had for some time been engaged in various transactions with C. and acted for him professionally. The business arrangements of the trust, including payment of the income to the *cestui que trust*, were carried on by B., no active part being

taken by A., who was a clergyman, and frequently absent abroad for his health. In 1859, C., with the knowledge and authorization of B., but without the knowledge of A., sold a portion of the mortgaged property to D. Upon this sale all notice of the mortgage was suppressed. The title deeds were handed to D., and the purchase-money, £3,000, was received by B., who gave C. a receipt "for self and co-trustees," promising to obtain A.'s execution of a reconveyance on his return to England. In 1870 C. contracted to sell a further portion of the property to E., and in the course of the transaction, on pressing for a reconveyance, was informed by B., that he had misappropriated the £3,000. Upon the representation that C. had succeeded in selling portions of the mortgaged properties for £4,500, A., who was wholly ignorant of the real state of the case, was induced by B. to execute—1, a conveyance by direction of C. to E., as purchaser for £1,500; and, 2, a reconveyance to C., in consideration of an alleged payment of £3,000, of the portions already sold to D. (to enable C., as it appeared, to convey this portion separately to a purchaser).

Upon receiving the reconveyance, C. executed the conveyance and completed the sale to E., and the purchase-money (£1,500) was handed over to B., who shortly afterwards absconded with the mortgage deed in his possession:

Held, (a), that A. was entitled to have the reconveyance of 1870 cancelled as obtained by fraud; and, (b), that the estate supposed to have been acquired by C. under such reconveyance having been destroyed, there had been no subsequent acquisition of title by C. so as to perfect against A., by estoppel, the defective title which D. acquired under his purchase from C. in 1859.

2. *Held*, also, that the relief sought against D. being to compel him to redeem A.'s prior mortgage, or in default to stand foreclosed, the doctrine that the court will not interfere as against purchasers for value without notice, did not apply; and that upon the failure of D. to redeem, A. was entitled to realize his security (except as to the part sold to E. against whom the bill was dismissed) by a sale, and to have the title deeds in the possession of D. delivered up.

3. Secondary evidence of the mortgage deed of 1856 under the circumstances admitted. *Heath v. Creaklock*. 756

BREACH.

See COVENANT, 449.

BROKERS.

1. By the usage of the London Stock Exchange stockbrokers who have entered into contracts for the purchase of stock are, in the event of the insolvency of their principal, justified in immediately selling the stock. A principal is insolvent within the meaning of this rule when he is unable to pay his debts in the ordinary course of business.
2. In equity an agent is entitled to be indemnified against liability, as well as loss, incurred on behalf of the principal.
3. Messrs. C., brokers on the London Stock Exchange, on behalf of Sir R. H., entered into contracts for the purchase of stocks to be completed on the 15th of July, 1870. On the 12th of July they wrote to Sir R. H. to the effect that unless he paid them on the 15th a balance (which consisted of the difference between the contract price of the stock and the value thereof at the market price of the day) owing to them from him they would be defaulters; but that if such payment were made, they would sell or continue the stocks, as he thought fit. Sir R. H. promised to pay, and directed them to deal with the stocks as they thought best, and they sold part and continued part. Sir R. H. did not pay on the 15th, but shot himself; on the next day a bank of which he was a partner stopped payment, and on the 19th he died. On the 16th Messrs. C. were (solely by reason of Sir R. H.'s failure to pay them) declared defaulters on the Stock Exchange, and ceased to be members of that body, and, in accordance with the rules, all their transactions for Sir

R. H. were closed, and all the stocks they had continued for Sir R. H. were sold at the price of the day. In consequence of the value of the stocks having fallen, the balance appearing to be due to them from Sir R. H. was thus largely increased. The stocks afterwards continued to fall in value. Messrs. C. afterwards paid 6s. 8d. in the pound on their Stock Exchange debts, and were readmitted as members of the Stock Exchange:

Held, that the sale was justifiable, both under the usage of the Stock Exchange (which entitles a broker to sell upon his principal becoming insolvent) and also because the continuation was only effected on the representation of Sir R. H. that he would pay on the 15th:

4. *Held*, also, that although Messrs. C. had not paid their debts in full, they were entitled to prove against Sir R. H.'s estate for the increased balance appearing due to them after the sales were effected. *Lacey v. Hill.* 729

C

CARRIERS.

1. Goods contained in several packages were delivered to a railway company at Chester to be carried to Halifax, under a contract note which expressed that they were to be carried "at owner's risk." Several of the packages were delayed, through the negligence of the company, for, as the jury found, an unreasonable time, and their contents were in consequence damaged:

Held,—upon the authority of *Robinson v. Great Western Ry. Co.* (85 L. J. (C.P.), 123),—that the special terms of the contract did not absolve the company from responsibility for these consequences, notwithstanding that the goods were to be carried at a lower rate than the ordinary rate. *D'Arc v. London, etc.* 417

2. When cannot show insurers have paid for property. 576 *note*.

CASES OVERRULED, REVERSED AND CONSIDERED.

Attorney-General v. Lloyd, 1 Ves. Sen., 82, disapproved. 744
Barwick v. English, etc., L. R., 2 Exch., 259, considered. 202
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Eady, Matter of, 6 Dowl., 615, approved. 486
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Mountstephen v. Lakeman, 1 Eng. R., 68, affirmed. 5
North Eastern, etc., v. Wanless, L. R., 6 Q. B., 481, affirmed. 1
O'Connell v. Regina, 11 Cl. & Fin., 250, disapproved. 323
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Richardson v. Richardson, L. R., 3 Eq., 686, disapproved. 669
Robinson v. Great Western, etc., 35 L. J., C. P., 123, followed. 417
Sezio v. Provazende, L. R., 1 Chy., 192, discussed. 689
Shirt v. Westby, 16 Ves., 393, distinguished. 816
Slater v. Pinder, L. R., 6 Exch., 223, considered. 531
Shurway v. Glynn, 9 Ves., 483, distinguished. 816
Weller v. London, etc., 8 Eng. R., 441, see 165
Western Bank v. Addie, L. R., 1 Sc. H. L., 145, distinguished. 202
Whitehead v. Whitehead, L. R., 16 Eq., 528, explained. 840
Wormald v. Mailland, 35 L. J. (Ch.), 69, questioned. 94

in relation to the Supreme Court, on the footing of inferior courts.

3. The power of the Supreme Court to issue a *certiorari* to the Courts of Mines in respect of any proceedings under the Mining Statute, 1865, has been taken away by statute.
4. An appeal may be brought by the shareholders of a mining company to the Chief Judge of the Court of Mines against an order made by a Judge of a Court of Mines for winding up a company upon such a proceeding as that prescribed by the 28th and following sections of the Mining Companies Limited Liability Act, 1864.
5. Where *certiorari* is said to be taken away by statute, the Superior Court is not absolutely deprived of the power to issue the writ; but its action as to the writ is controlled and limited, and it cannot quash the order removed by *certiorari* except upon the ground either of a manifest defect of jurisdiction in the tribunal that made the order, or of manifest fraud in the party procuring it. *Colonial Bank v. Willan*. 225
6. By 9 & 10 Vict. c. 24, s. 3, every writ of *certiorari* for removing an indictment from the Central Criminal Court shall specify the county or jurisdiction in which the same shall be tried, and a jury shall be summoned and the trial proceed in the same manner in all respects as if the indictment had been originally preferred in that county or jurisdiction.
7. An indictment was found by the grand jury in the Central Criminal Court for perjury committed within the jurisdiction of the Central Criminal Court. The perjuries assigned in one count were in respect of an oath taken before a commissioner in Chancery, in the city of London; and in the other count, in respect of an oath taken in the Court of Common Pleas, in Middlesex. The indictment was removed by *certiorari* into the Court of Queen's Bench, and Middlesex was specified as the county in which the indictment should be tried, and the jury were taken from that county:
Held, that the Court of Queen's Bench had a discretion to name in the *certiorari* the county or jurisdiction in which

CERMETERY.

See CHARITY, 685.

CERTIORARI.

1. The Supreme Court of the colony of Victoria has a general power to issue a writ of *certiorari* to any inferior court in the colony to bring up the proceedings of such court, coextensive with the like power of the Court of Queen's Bench in England.
2. The Courts of Mines, which have been created by acts of the local legislature of the colony of Victoria, and with a jurisdiction limited both as to the persons and the matters within the colony over which it is to be exercised, stand

the trial was to take place, and that by the jurors summoned from that jurisdiction the same issues could be tried that would have been tried in the Central Criminal Court had the indictment not been removed. *Regina v. Tichborne*. 328

See JURISDICTION, 226.

CHARGE.

See WILL, 744.

CHARITY.

1. A hospital was empowered by an act of Parliament by which it was incorporated, by will, gift, purchase, or otherwise, to obtain, acquire, hold and retain land for the purposes of the charity; and also by will, gift, purchase, or otherwise, to obtain, acquire, hold and maintain, for the purposes of the charity, any kind of personal estate, including money secured on mortgage or charged on land:

Held, that those words implied a power to devise land for the use of the charity, and, therefore, that where a testator gave certain legacies to this as well as other charities out of a mixed fund of realty and personalty, the charity in question was entitled to receive the legacy in full. *Perring v. Trail*. 682

2. Testator bequeathed to his executors £600 out of his pure personal estate, upon trust to invest and apply the income in keeping in good repair all the tombstones and headstones of his relatives and himself in G. churchyard, and directed that any surplus that might remain after defraying yearly the expenses as before stated, should be given by his executors every year to poor pious members of the Methodist Society in G. above the age of fifty years:

Held, that the trust to keep the tombstones in repair being honorary only, the whole £600 was well given for the benefit of the Methodist poor, discharged from the obligation of keeping the tombstones in repair. *Dawson v. Small*. 685

See WILL, 744.

CHARTER PARTY.

See ADMIRALTY, 309.

BILL OF LADING, 264.

CHATTEL MORTGAGE.

1. A bill of sale of furniture was given to secure the payment of £250 and interest, the money being made payable on demand. In default of payment on demand the mortgagee was empowered to take possession. The bill of sale was registered within the proper time. There was a prior parol agreement, not appearing in the bill of sale, that the debt should be paid off by small weekly instalments. The mortgagor was adjudicated a bankrupt, but before the adjudication was made the mortgagee had taken possession:

Held, that this parol agreement amounted to a defeasance or condition within the meaning of sect. 2 of the Bills of Sale Act, 1854; and that, as the agreement was not registered, the bill of sale was void as against the trustee under the bankruptcy. *In re Southam*. 657

CHECK.

See PROTEST, 363.

CHILD.

1. What degree of care held to, when parent's negligence attributable to, and how much proof of negligence required.

469, 474 *note*.

See UNBORN CHILD, 577, 668.

CHILDREN.

1. When illegitimate included in will.

577, 629

2. When unborn included.

577

CITY.

1. Liability if for injury from sewers. 409
2. When officer cannot contract with. 367, 374 *note*.

See MUNICIPAL CORPORATION.

CLIENT.

See CRIMINAL LAW, 505.
MORTGAGE, 94, 114 *note*.

COMPROMISE.

1. The defendant purchased, through his broker, 800 shares in a joint stock company, and gave directions that they should be transferred into the name of his son, G. E. On the same day the plaintiff instructed his broker to sell 100 shares in the company, and they were bought by the defendant's broker, on his account, through a jobber in the ordinary way, and were transferred to G. E., and were registered in his name. At that time G. E. was an infant, of which fact the plaintiff was not aware. Soon afterwards the company was wound up voluntarily, and G. E. then brought an action by his father, as next friend, against the plaintiff, who was an auditor of the company, charging him with fraud in selling the shares, knowing that the company was in an insolvent condition, and claiming damages. The action was compromised on the terms that all charges of fraud should be withdrawn, and that the purchase-money should be repaid to G. E. The liquidators on discovering that G. E. was an infant substituted the name of the plaintiff for his as a contributory of the company. The plaintiff then filed a bill against the defendant, charging that he was the real purchaser of the shares, and that the plaintiff was not aware of that fact when he entered into the compromise with G. E., and claiming to be indemnified by the defendant against all loss in respect of the transaction:

Held, by Malins, V.C., that the plaintiff was entitled to be indemnified, and that he was not precluded from maintaining the suit by the compromise with G. E.:

2. But *held*, by the Court of Appeal (reversing the decision of Malins, V.C.), that the compromise was an effectual bar to the plaintiff's claim to relief, and that the fact of his ignorance that the defendant was the real owner of the shares was immaterial. *Maynard v. Eaton*, 515, 523 *note*.

CONDITION.

See DEVISE, 309.

CONFESSION OF JUDGMENT.

See INTEREST, 17.

CONSIDERATION.

See BILL OF LADING, 275.

CONSTRUCTIVE NOTICE.

See BONA FIDE, 114 *note*, 223 *note*.

CONTEMPT.

1. When a judge, in the legitimate exercise of his jurisdiction, is defiantly disobeyed, he may commit the offender instantly to prison for contempt of court.
2. A document *in manibus curie* having been carried away by an agent regardless of the judge's remonstrances:
Held, that a process-caption was a proper remedy, and that notice of its issue was unnecessary. *Watt v. Ligertwood*, 195

CONTRIBUTION.

1. When legatees or next of kin bound to contribute and pay moneys received

from personal representative. *Jervis v. Wolferstan.* 674

See MARSHALLING ASSETS, 658.

CONVERSION.

1. Real estate was conveyed to trustees upon trust for two infants as tenants in common in tail, with cross remainders between them. A suit was instituted by the trustees against the *cestuis que trust* for the administration of the trust, and a decree was made after one of the infants had attained twenty-one, by which (the court being of opinion that a sale would be for the benefit of the infant defendant, and the adult defendant consenting) a sale was ordered. A sale was made under the decree, and the purchase-money paid into court; and upon further consideration the adult's share was paid to him, and the infant's share carried to his separate account. The infant afterwards died without having attained twenty-one:

Held, that the fund in court belonged to his legal personal representative, and was not to be treated as realty. *Steed v. Preece.* 738, 743 note.

See CRIMINAL LAW, 505.

CORPORATION.

See CHARITY, 682.
PRESUMPTION, 225, 255 note.

COSTS.

1. When paid out of fund realized from real estate taken by railway where life estate. *Strathmore's Estate.* 848

See TRUST AND TRUSTEES, 858.

COVENANT.

1. The plaintiff purchased two of several plots of building land of which the defendant was mortgagee in fee. The conveyance, to which the defendant and the mortgagor were both parties, con-

9 ENG. REP. 112

tained a grant of a right of way in these terms,—“Together with full and free right and liberty for the grantee, his heirs, &c., at all times and for all purposes, &c., with or without horses, carriages, &c., to pass and repass over and along the roads or intended roads and ways delineated in the plan,” and also a covenant *by the defendant* that he had not “done, omitted, or knowingly suffered or *been party or privy* to anything whereby the premises conveyed, or any part thereof, were or might be impeached, affected, or incumbered in title, estate, or otherwise howsoever, or whereby he was in anywise hindered from granting and releasing the same premises, or any part thereof, in manner aforesaid.”

Another plot had previously been sold to A. In the conveyance to A. (to which the defendant as mortgagee was a party), the mortgagor covenanted with A. that he would at his own expense “pave and complete and make fit for use, and at all times maintain in good repair, a private road, the site of which private road is marked ‘Private Road A B’ on the plan drawn in the margin of these presents (describing it), and will make such road of a width of not less than forty feet throughout its entire length.” This was the road over which a right of way was granted to the plaintiff in his conveyance. In this deed was also a proviso that it should be lawful for A. “to erect and maintain a *porte-cochère* or projection extending over the foot-pavement of the said private road marked A B, provided that the plan thereof be submitted to the mortgagor, and approved of by him.” This portico when finished projected about two feet into the carriage-way of the private road A B, but there was ample space left for the convenient enjoyment by the plaintiff of the way granted to him:

Held, that, there being no substantial interference with the right of way or easement granted to the plaintiff, he was not entitled to maintain an action against the defendant upon his covenant; but that, if there had been such interference with any right of the plaintiff, however small the damage, the defendant was sufficiently a “party or privy” to the conveyance to A. as to have rendered him liable. *Clifford v. Hoare.* 449

See LANDLORD AND TENANT, 464.
LIGHT, 559.

CRIMINAL LAW.

1. *Bailees, misappropriation by.* The defendant, an attorney, was employed to raise a loan of money on mortgage, of which he was to apply a part in paying off an earlier mortgage, and to hand over the rest to the mortgagor. He prepared the mortgage deed, received the mortgage money, and handed over the deed to the mortgagee in exchange. He then misappropriated a part of the money to his own use:

Held, that no offence had been committed under s. 75 or s. 76 of 24 & 25 Vict. c. 96. *Regina v. Cooper.* 505

2. *Court, place of holding.* Under 33 Vict. c. 6, s. 5, sittings at *nihi prius* for Middlesex may be held at the Sessions House, Westminster, instead of in Westminster Hall. *Regina v. Tichborne.* 828

3. *Evidence.* At the trial of an indictment it was proposed to read the deposition of a witness on the ground that the witness was so ill as not to be able to travel. The evidence upon that point was as follows: The medical attendant of the witness was called and said: "I know M. L. She is very nervous, and seventy-four years of age. I think she would faint at the idea of coming into court, but I think that she could go to London to see a doctor without difficulty or danger. I think the idea of seeing so many faces would be dangerous to her, and that she is so nervous that it might be dangerous to her to be examined at all. I think she could distinguish between the court going to her house and she herself coming to the court." The witness whose deposition it was proposed to read lived not far from the court:

Held, that the deposition was not admissible. *Regina v. Farrell.* 499

4. On the trial of an indictment for endeavoring to obtain an advance from a pawnbroker upon a ring by the false pretence that it was a diamond ring, evidence was admitted that two days before the transaction in question the prisoner had obtained an advance from a pawnbroker upon a chain which he represented to be a gold chain, but which was not so, and endeavored to obtain from other pawnbrokers advances upon a ring which he represented to be a diamond ring, but which, in the opinion

of the witnesses, was not so. This ring was not produced:

Held, that the evidence was properly admitted. *Regina v. Francis.* 509

5. *Malicious mischief.* The prisoner had been fighting with persons in the street and threw a stone at them, which struck a window and did damage to an amount exceeding £5. He was indicted under the Malicious Injury to Property Act for "unlawfully and maliciously" causing this damage. The jury convicted him, but found that he threw the stone at the people he had been fighting with, intending to strike one or more of them, but not intending to break the window:

Held, that by thus finding the jury negatived the existence of malice, either actual or constructive, and the conviction must therefore be quashed. *Regina v. Pemberton.* 501

6. *Perjury.* The 2 Geo. 2, c. 25, s. 2, imposes the sentence of transportation (now altered to penal servitude) on persons convicted of perjury according to the laws then in being. The defendant was convicted of perjury on an indictment, one count of which averred that the oath was taken in the Court of Chancery before a commissioner authorized to take an oath by 16 & 17 Vict. c. 78; he was sentenced to penal servitude upon that count:

Held, that the offence of perjury consists in taking a false oath in a judicial proceeding, and whether the oath is taken in a judicial proceeding before a court at common law, or acting under a statute, it is equally an oath taken in a judicial proceeding, and punishable by penal servitude. *Regina v. Tichborne.* 823

7. *Term.* By 11 Geo. 4 & 1 Wm. 4, c. 70, s. 7, if a trial at bar shall be directed by any of the superior courts, it shall be competent for the judges of such courts to appoint such day or days for the trial thereof as they shall think fit; and the time so appointed, if in vacation, shall, for the purposes of such trial, be deemed and taken to be a part of the preceding term.

8. A trial at bar having been ordered, in an indictment for perjury, the Court of Queen's Bench, in Hilary Term, appointed for the trial the 23d of April, 1873, and every day up to and inclusive

of the 1st day of November, 1873, and further ordered that, in case the trial should not terminate on or before the 1st day of November, 1873, the further trial should be adjourned till Michaelmas Term next, and be thereafter continued at such times as the court should then direct. The court did not sit continuously, but adjourned not only over Sundays and holidays, but also over days included in this period on which it might have sat. The court afterwards, in Michaelmas Term, 1873, made a second order, appointing every day in Michaelmas Term, 1873, and every day up to Michaelmas Term, 1874, for the trial. On the 28th of February, 1874, a day in vacation after Hilary Term, the defendant was found guilty, and the court immediately passed sentence on him:

Held, that the court had, under the above enactment, power to appoint such days as they should think fit for the trial, and that it was not necessary that this power should be exercised once for all, or that it should be limited to the appointment of days in the vacation next succeeding the term in which the order was made.

9. *Held*, also, that, as an incident to the trial at bar the court had power to adjourn from time to time.

10. *Held*, also, that a sentence, passed out of term, but on one of the days which, by virtue of the above enactment, are, "for the purposes of the trial, to be taken as part of the preceding term," was good, passing sentence being part of the trial. *Regina v. Tichborne*.

828

See ANIMALS, 341.
CERTIORARI, 323.
FACTORY, 335.
GAMING, 374, 429.

CRUELTY TO ANIMALS.

See ANIMALS, 341.

CUSTOM.

See ADMIRALTY, 443.
BROKERS, 729.
MASTER AND SERVANT, 338.
PROTEST, 363.

D

DAMAGES.

1. Upon a contract for the sale and purchase of a real estate, if the vendor, without fraud, is incapable of making a good title, the proposing purchaser is not entitled to recover compensation in damages for the loss of his bargain.

2. F. was in possession of a mining royalty under a written agreement for a lease, of which he had taken an assignment. One of the stipulations of the agreement was that H. (the person with whom the agreement was originally made) should not assign without the license of the lessors. They were ready to consent to the assignment to F. provided he would execute a duplicate of the agreement containing this stipulation. Though repeatedly communicated with on the subject he delayed doing so. He entered into a contract with B. to sell his interest in the royalty, it was afterwards found that the lessors absolutely refused their assent to the transfer, and F. was unable to perform his contract with B. In an action by B. against F. for its non-performance:

Held, that B. could only recover the expenses he had incurred, but not damages beyond them.

3. *Per* LORD CHELMSFORD: The rule laid down in *Flureau v. Thornhill* as to the limits within which damages may be recovered upon the breach of a contract for the sale of real estate, must be taken to be without exception. If a person enters into a contract for the sale of real estate, knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot, in an action for breach of the contract, recover damages beyond the expenses he has incurred. Any other damages must be the subject of an action for deceit.

4. *Per* LORD HATHERLEY: A contract for the sale of real estate is very different from a contract for the sale of a chattel. In the former the purchaser knows that there must, with all the complications of our law, be an uncertainty as to making out a good title; in the latter the vendor must know what his right to the chattel is. *Bain v. Fothergill*. 116, 164 note.

5. When carrier or wrong-doer cannot show insurers have paid for property. 576 note.
6. When insurers have right to entire recovery against carrier or wrong-doer though value of property greater than recovery. 576 note.

DEED.

See ACKNOWLEDGMENT OF DEED, 436, 443 note.

DEPOSITION.

See CRIMINAL LAW, 499.

DESCENT.

See ELECTION, 39.

DEVASTAVIT.

See LEGACY, 826.

DEVISE.

1. Where a devise is to determine on the devisee ceasing to use a certain house as his residence, and no manner or period of residence is prescribed, exclusive residence is not supposed to be meant; the occasional use of the house and keeping an establishment in it with the intention of again using it as a residence is a sufficient compliance with the condition.
2. Question raised as to what is a sufficient compliance with the condition of using a Boitokanah house as a residence.
3. The condition as to cesser does not arise in consequence of the devisee not using the house in any sense as his residence for four years after the testator's death, where the delay can be justified by the pendency of a suit brought to defeat his title, and by his inability to obtain possession of the whole of the house from trustees, and by the unfit state of the house for residence owing to the want of repairs, which were in progress. *Tagore v. Tagore*. 309
4. The terms "forfeiture" and "breach of condition" used in the statute 3 & 4 Will. 4, c. 27, ss. 3, 4, are to be read in the largest sense, and extend to forfeitures which operate to accelerate an estate under a conditional limitation, as well as to forfeitures of which the heir-at-law only can take advantage.
5. Ignorance of a condition annexed to a gift by will does not protect the devisee or legatee from the consequences of not complying with the condition.
6. An estate was devised in strict settlement, subject to a clause directing that every person who should become entitled in possession under the will should, on becoming so entitled, assume the testator's name and arms; and it was provided, that in case any such person should fail or neglect so to do for twelve calendar months after he should become so entitled in possession, his estate and interest should cease, and the estate should go to the person who should be next in remainder and then *in esse*, as if the person so failing or neglecting were then dead. A tenant in tail, who did not comply with the clause, remained in possession of the estate for more than twenty years. At his death the next remainderman was in India, and being ignorant of his rights under the will, did not comply with the clause:
7. *Held*, that the tenant in tail had not acquired a title by adverse possession, but that on his death, by virtue of the act 3 & 4 Will. 4, c. 27, s. 4, the remainderman became entitled to the estate:
Held, also, that the remainderman's estate was forfeited by reason of his non-compliance with the name and arms clause. *Asley v. Earl of Essex*. 809

See CHARITY, 682, 685.

DIRECTORS.

1. A direction given by persons who are directors of a company to their bankers, when the company had a balance

in the hands of the bankers, to honor checks drawn and signed in a particular manner, does not of itself impose on the directors any personal responsibility as to those checks. This direction is in no sense a misrepresentation, so as to make personally liable those who gave it to those who acted upon it.

2. Nor, though that direction should continue to be acted on by the bankers after the company's account has been overdrawn, will it entail on the directors who gave it any personal liability. Nor will it entail any such liability on those who, at a subsequent meeting of the board of directors, confirmed the minutes of the board meeting at which it was given, and who drew checks in accordance with it, though the account was overdrawn when these latter checks were issued and honored.
3. Bankers under advances to a railway company made a demand on the directors of the company to deliver to them as "security" for the advances "unissued shares" of the company, and "such preference shares and debentures as you may obtain authority to raise in next session of Parliament." This demand was not construed to mean that the shares and debentures should be paid-up shares and debentures, and the directors by delivering unissued shares and debentures (on which money had not been paid), were not guilty of any misrepresentation, and did not render themselves liable to make good to the bankers those shares and debentures.
4. Where bankers have demanded and received unissued preference shares of a railway company as "collateral security" for advances they have made on the company's checks, and have been registered on the registry of the company as the holders of such shares, a court of equity will examine into the circumstances of the transaction, and can direct the proper steps to be taken to cancel such registration.
5. The order of the House directed the officers of the railway company to take all proper measures for cancelling the registration. But the order on the appellants to pay costs was not postponed till the bankers' names had been taken off the register. *Beattie v. Lord Ebury*.

64

DISCOVERY.

1. In a suit in which the genuineness of the signature of a testator to a certain document was one of the issues to be tried, the defendant was ordered to produce on affidavit any checks in his possession signed by the testator between specified dates. The defendant produced a great number of checks, stating in his affidavit that they were all the checks in his possession signed by the testator, but that he had other checks drawn on the testator's bankers, which he did not produce because they were forgeries:

Held, that the plaintiffs were not entitled to any further particulars, or to production of the checks alleged to be forged.

2. *Quare*, whether a document required only for comparison of handwriting is a relevant document which a defendant is bound to specify or produce. *Wilson v. Thornbury*.

641

DISTRESS.

1. Upon a demise of mines a power of distress for the rent reserved was granted to the lessor over "any lands in which there shall be, for the time being, any pits or openings by or through which the coal or culm by the said deed demised shall for the time being be in course of working by the lessees, their executors, administrators, and assigns." The plaintiffs, being assignees of the lease with notice, under a trust deed made by the lessees for the benefit of creditors, sued the defendants for a distress made under the above-mentioned power, after the assignment, at pits not included in the demise, but referred to in it, and then worked by the lessees:

Held, that, whether the power was or was not a valid power of distress against strangers, the plaintiffs, taking as assignees with notice, were bound by it. *Daniel v. Steptey*.

495

2. Two tenants in common mortgaged an estate to secure a debt which they jointly and severally covenanted to pay, and each of them separately attorned tenant to the mortgagees of a part of

the estate of which they were jointly in occupation, at a rent equal to half the annual interest on the mortgage debt. The mortgagors were partners in the business of brickmakers, which they carried on upon that part of the estate which was in their joint occupation:

Held, that the mortgagees could not distrain for the rent upon the partnership property which was on the estate. *Matter of Perks*. 878

DOMICIL.

See RESIDENCE, 400.

DRAINS.

See NEGLIGENCE, 409.

E

EASEMENT.

See COVENANT, 449.
LIGHT, 559.

EJECTMENT.

See INFANT, 608.

ELECTION.

1. The rule of the Statute of Distributions which requires the conversion of an intestate's estate into money, is introduced simply for the benefit of creditors, and the facility of division among the next of kin. But, as regards the substantial title to property, the right of the next of kin (subject only to the claims of creditors) is complete.
2. A residuary legatee under a will has a clear and tangible interest in the residue, and the Statute of Distributions being nothing but a will made by the legislature for an intestate, his next of

kin stand, with regard to his personal estate, in the same condition as does a residuary legatee under a will:

3. Both may therefore be subject to the rule of election.
4. In these respects a creditor does not resemble either.
5. A married woman cannot declare an election. An inquiry was therefore directed in the case of a married woman (one of two next of kin required to elect) for the purpose of ascertaining whether it was for her benefit and the benefit of her children to take under or against a will.
6. A. gave a certain estate, P. H. (together with personal property), to trustees on trust, after his widow's death, to sell, and hold the proceeds, with his other property, in trust for any one of his children in such form and manner as his widow, before a certain fixed period, should appoint. A. died, leaving three sons, W. H., R. E., and F. J. Before the expiration of the fixed period the widow executed a deed by which, after disposing of other property, she directed the proceeds of P. H. to be divided equally among the three sons. The deed reserved to her a power of revocation. She afterwards, believing that she still possessed power to dispose of the estate, made a will, by which she gave this estate of P. H. to W. H., the eldest son, and then, by different successive codicils, gave benefits to the other two sons, and a special legacy to each of the two children of R. E. (the only one of the three sons of the original testator who had married). R. E. died before his mother, and died intestate. On her death a suit was instituted, in which it was declared that, so far as the estate of P. H. was concerned, her will (which could only speak from the date of her death, and therefore long after the expiration of the period fixed for the making of the appointment) was inoperative. W. H. then filed a bill to compel the two children of R. E., and also his youngest brother, F. J., to elect between their claims under the deed of appointment and under the will and codicils. F. J. submitted; the two children of R. E. resisted:

Held, that their rights under the deed of appointment, though derived through

their father, were exactly the same as were those of F. J., and that they were bound to elect:

7. *Held*, also, that the special legacies to the two children of R. E., though given to them by name, and given before his death, must be taken into account together with the interest which they derived through him as his next of kin, the whole of the benefits to be taken under the two titles being subject to election.

8. A special direction was inserted in the order of the House as to the mode of taking the account with reference to the administration of the estate of R. E.
Cooper v. Cooper. 89

EMINENT DOMAIN.

1. Taking water by right of. 556 *note*.
See LIFE ESTATE, 848.

EQUITY.

See INFANT, 608.

ESTOPPEL.

See BONA FIDE PURCHASER, 756.
LANDLORD AND TENANT, 844, 849 *note*.
LICENSE, 844, 849 *note*.

EVIDENCE.

See CRIMINAL LAW, 499, 509.

EXECUTORS AND ADMINISTRATORS.

1. When may recover back aliquot proportion of assets paid to legatee or next of kin. *Jervis v. Wolferstan.* 674

2. When entitled to purchase money for real estate. 748 *note*.

See GIFT, 827.

LEGACY, 27, 826.

MARSHALLING ASSETS, 658.

EX PARTE.

See REVENUE, 389.

EXPERIMENT.

See LIGHT, 559.

EXTINGUISHMENT.

See GIFT, 827.

F

FACTORY.

1. Premises, consisting of ten acres, in which the manufacture of cement from chalk and mud is carried on chiefly in the open air, and in which 200 people are employed in grinding and washing in mills, but in which there is no great building in which men and women are employed under cover, are not a "factory" within 80 & 81 Vict. c. 108, s. 3, sub. 7. *Redgrave v. Lee.* 385

FENCE.

See NEGLIGENCE, 487.

FILING.

See CHATTEL MORTGAGE, 657.

FORECLOSURE OF MORTGAGE.

See BONA FIDE PURCHASER, 756.

FOREIGNER.

See JURISDICTION, 850, 857 *note*.

FORFEITURE.

See DEVISE, 809.

LANDLORD AND TENANT, 464.

LEGACY, 781.

FORMER SUIT.

1. As to when suit in federal courts bar to one in state courts, and *vice versa*.

858 *note*.

See FRAUD, 225.

FRAUD.

1. If a man misrepresents a fact, to that fact he is bound, if any other person, misled by such misrepresentation, acts upon it, and thereby suffers damage. *Beattie v. Lord Ebury*. 64

2. Where a question was raised whether a fraudulent use had been made of the machinery for winding up registered companies, such question being a complicated one, dependant on a variety of circumstances capable of explanation, and requiring nice consideration:

Held (reversing the decision of the Supreme Court of the colony of Victoria), that the order complained of ought not to have been quashed on *certiorari*.

3. *Semble*, the Court of Mines of the colony of Victoria has power to review an order of its own for winding up a registered company whether made *ex parte* or not, on the suggestion that the order was fraudulently obtained.

4. If a party makes a fraudulent use of the process of a Mining Court, and no

remedy is to be had in that court, the parties aggrieved may obtain relief by regular suit in the supreme or other competent court. *Colonial Bank v. Willan*. 225

See BONA FIDE PURCHASER, 756.

COMPROMISE, 515, 523 *note*.

PLEADING, 202.

PRINCIPAL AND AGENT, 202, 222 *note*.

FRAUDS, STATUTE OF.

1. A memorandum containing proposed terms for the sale of a ship having been drawn up by the vendors' broker, but not signed, was sent to the purchaser. He made certain interlineations in red ink altering the terms, and having signed the document, returned it to the vendors' broker. The alterations were subsequently not acquiesced in by the vendors, and were struck out, and further interlineations were made by the vendors. The vendors' broker then signed the document and submitted it to the purchaser, who assented to the terms of it as it then stood:

Held, in an action on a contract in the last-mentioned terms against the purchaser, that, notwithstanding the provisions of the Statute of Frauds, parol evidence was admissible to show that the purchaser had so assented, inasmuch as there never had been a contract between the parties until such assent on his part; and the effect of the parol evidence was, therefore, not to vary a written contract, but merely to show what was the condition of the document when it became a contract between the parties. *Stewart v. Kid-dowes*. 405

2. Upon a sale by auction of real estate in lots the particulars stated that the sale was by direction of the proprietor; but the name of the vendor did not appear. A memorandum indorsed on a copy of the particulars was signed by the purchaser of one of the lots, and by the auctioneer on behalf of the vendor:

Held, that the vendor was sufficiently described, and that the memorandum was sufficient to satisfy the requirements of the Statute of Frauds: and specific performance of the agreement

decreed at the suit of the purchaser.
Salé v. Lambert. 661

3. In order to satisfy the requirements of the Statute of Frauds, the note or memorandum of an agreement for the sale of real estate must contain either the names of the contracting parties or such a description of them that there cannot be any fair dispute as to their identity.

4. The term "vendor" is not of itself a sufficient description of one of the contracting parties.

5. Real estate was put up for sale under particulars and conditions of sale which did not disclose the vendor's name, but stated that B. was the auctioneer. The purchaser of one of the lots signed a memorandum acknowledging his purchase; and B. signed at the foot of this memorandum another in these terms, "Confirmed on behalf of the vendor. B.":

Held, that the memorandum did not sufficiently show who the vendor was; and a bill for specific performance of the contract for sale was dismissed. *Potter v. Duffield.* 664

6. Where the vendors of land, in a letter acknowledging the receipt of an offer by intending purchasers, wrote as follows: "Which offer we accept, and now hand you two copies of conditions of sale," and therewith enclosed a formal agreement with conditions of a special character:

Held, that the acceptance was only conditional, and that there was no final agreement of which specific performance could be enforced as against the purchasers. *Crossley v. Maycock.* 727

See PRINCIPAL AND SURETY, 5, 14.

FREIGHT.

See ADMIRALTY, 379.

G

GAMING.

1. The appellant was the occupier of certain enclosed grounds, in which a
9 ENG REP. 113

pigeon-shooting match between two persons for £10 a side, and afterwards a foot-race took place, and into which the public were admitted on payment of money. The persons who were admitted into the grounds made bets with each other both on the pigeon-shooting match and on the foot-race:

Held, that the grounds were a "place," and that they were kept and used by the appellant for the purpose of betting within the meaning of the Betting Houses Act (16 & 17 Vict. c. 119), s. 8. *Eastwood v. Miller.* 374

2. The appellant was on a race-course standing on a stool, over which was a large umbrella, similar to a carriage umbrella, capable of covering several persons, the stock being made in joints like that of a sweep's brush, so as to be taken in pieces, and was fastened in the ground with a spike. The umbrella when open was seven or eight feet high. It was a showery day; but the umbrella was kept up rain or dry. On the umbrella was painted in large letters "G. Bows, Victoria Club, Leeds." There was also a card exhibited, on which were the words, "We pay all bets first past the post." The defendant was calling out, offering to make bets; and he was seen to make several bets, the money being deposited with him, and for which he gave a ticket:

Held, that the appellant was using a fixed and ascertained "place" for the purpose of betting with persons resorting thereto, and was properly convicted thereof under 16 & 17 Vict. c. 119, s. 8. *Bows v. Fenwick.* 429

GIFT.

1. B. borrowed £1,100 from his step-mother, who lived in his house, paying £212 10s. a quarter for board; and it was agreed that the debt should be paid off by a deduction of £100 from each quarter's payment. Deductions of this amount were made for two quarters, but on the third quarter-day the creditor refused to make any further deduction, and paid the full amount of £212 10s., and continued down to the time of her death (which took place more than four years afterwards) to pay to B. the like quarterly sum. B.

was appointed sole executor of his step-mother, and proved the will: and a suit for administration was instituted:

Held, that the debt was gone: first, because the appointment of B. as executor released the debt at law, and any claim in equity was rebutted by evidence of a continuing intention on the part of the testatrix to give; and, secondly, because the intention of the testatrix to give B. the sum of £900 was completed by nine quarterly payments of £212 10s. each. *Strong v. Bird*. 827

See TRUST AND TRUSTEES, 669.

GUILTY KNOWLEDGE.

See CRIMINAL LAW, 509.

H

HEIR.

- 1 When executor must pay for real estate to be conveyed to. 748 *note*.

HIGHWAY.

See RAILWAY COMPANY, 360.

HOSPITAL.

See CHARITY, 682.

HOTCHPOT.

See LEGACY, 826.

I

IGNORANCE.

See DEVISE, 809.
LEGACY, 781.

IMPOSSIBILITY.

1. There is no warranty by a contractor that work can be done according to plan of engineer. *Thorn v. City of London*. 475

IN VENTRE SA MERE.

See UNBORN CHILD, 668.

INCOME.

See TENANT FOR LIFE, 611.

INDEMNITY.

See PRINCIPAL AND AGENT, 729.
TRUST AND TRUSTEES, 674.

INFANT.

1. Where an infant is entitled both at law and in equity to real estate as against another who is in wrongful possession, he is entitled to recover in equity on a bill stating these facts and asking a declaration of title and account, and may join adult remaindermen as co-plaintiffs. *Howard v. Earl of Shrewsbury*. 603
2. When property treated as real, and when personal. 738, 743 *note*.

INJUNCTION.

1. In cases of interference with water-courses. 556 *note*.
2. In order to obtain an injunction restraining a threatened act on the ground that, if done, it will be a violation of some legal right, the plaintiff must show that the act must result in a violation of such right.

The owner of an estate, the shooting over which had been let for a term of years, issued particulars of sale of the estate in thirteen lots, stating that the estate contained several plots of accommodation and building land suitable for the erection of villas and residences, and describing one lot in particular as well situated for the erection of a house. The particulars showed that it was intended to make a road through the estate and dedicate it to the public; but gave full notice of the right of shooting: *Held*, that the court would not, at the instance of the owner of the right of shooting, interfere to prevent the intended sale. *Pattison v. Gilford*. 786

3. Courts of one country may restrain proceedings in the courts of another. 857 note.

4. When granted and when not to restrain cutting of trees, or from obstructing view by. 825 note.

5. Will issue to restrain patentee from issuing threatening circulars, unless will litigate and settle right to patent. *Azmann v. Lund*. 841

See LIGHT, 559.

MINES, 585.

NUISANCE, 720, 726 note.

INSANITY.

See LUNATIC, 792.

INSURANCE, FIRE.

1. The owner of a building insured it against fire, but not to the full value. The building was burnt by what was said to be the negligence of the servants of a municipal corporation; and the owner brought an action for damages against the corporation:

Held (affirming the order of the Master of the Rolls), that the owner undertaking to sue for the whole amount of damage, would be allowed to conduct the action without the interference of the insurers, but would be subject to liability for anything done by him in

violation of any equitable duty towards the insurers. *Commercial, etc., v. Lis-ter*. 572, 576 note.

INSURANCE, MARINE.

1. The defendants, a Liverpool insurance company, employed the firm of E. & Co. as their agents in London. The plaintiffs instructed P. & Co. to insure for them steel rails, and P. & Co. prepared a slip, which was initialed by E. & Co. on behalf of the defendants. According to the course of business observed by the defendants' company, P. & Co., sent a copy of the slip to E. & Co., who the same night sent it to the defendants at Liverpool. P. & Co. paid to E. & Co. the premium due on the policy and the amount due for the stamp duty. The steel rails were afterwards totally lost by the perils intended to be insured against, and the defendants then refused to execute any stamped policy:

Held, affirming the judgment of the court below, that no action would lie; for that the initialing of the slip and forwarding the copy slip to the defendants were parts of one contract; and that no further contract could be implied to execute a stamped policy within a reasonable time after the copy slip was transmitted to the defendants; and as no stamped policy had been executed, 30 Vict. c. 23, ss. 7 and 9 prevented the plaintiff from maintaining an action. *Fisher v. Liverpool, etc.* 352, 361 note.

2. In a voyage policy of insurance "at and from" a port, it is an implied understanding that the ship shall be at the port within such a time that the risk shall not be materially varied; and if there is delay beyond such time, the policy does not attach. *De Wolf v. Archangel, etc.* 383

INTENT.

See CRIMINAL LAW, 501, 509.

INTEREST.

1. Where a written security is given for the payment of money at a certain day,

with interest up to that day, and the sum secured and the interest thereon are not paid at the day, the principal and interest become from that time a debt which, when recovered by legal process, may, in the discretion of a jury or of the court, be made the subject of an additional liability, which, however, is not properly a liability to interest according to the contract, but to damages for the breach of it.

Per LORD CHELMSFORD: The defeasance of a warrant of attorney is not a contract, but merely a description of the object of the security, and of the means of enforcing payment.

2. *Per* LORD SELBORNE: There is no rule of law that, upon a contract for the payment of money on a day certain, with interest at a fixed rate, down to that day, a farther contract for the continuance of the same rate of interest is to be implied.

3. A warrant of attorney was given to secure payment of a sum of money. Its date was the 2d day of May, 1864, and the defeasance was in these terms: "The within written warrant of attorney is given for securing the payment of the sum of £1,330, with interest thereon, at and after the rate of £5 per cent. per month, on the 2d day of June next. Judgment to be entered up forthwith," &c.:

Held, that this was nothing more than an authority to enter up a judgment for these various sums, to be ascertained on the 2d of June, 1864, after which time the holder would merely stand as a creditor for the sums so ascertained, and the statutable rate of interest thereon that might be allowed him by a jury or by the court. *Cook v. Fowler*. 17.

4. The contract between a railway company and a contractor provided that payments should be made monthly, as the works proceeded, on the certificates of the company's engineer. There was no stipulation in the contract in reference to the payment of interest to the contractor on any sums due, but not paid to him. The contractor made a demand in writing for a sum as the balance due to him, and claimed interest thereon. His accounts were disputed, but on a bill filed by him against the company, the result showed that he was entitled to a balance less

than one-half of the sum which he had claimed to be due from the company:

Held, that the contractor was not entitled to interest either under the contract, there being no express stipulation on the part of the company to pay any, or under the statute 3 & 4 Will. 4, c. 42, s. 28, the demand in writing for payment not being of a sum certain payable at a certain time. *Hull v. South, etc.* 704.

See LEGACY, 816.

INTERNAL REVENUE.

See REVENUE, 389.

J

JUDGMENT.

See CRIMINAL LAW, 323.
FRAUD, 225.
JURISDICTION, 225.

JURAT.

1. When omission of affiant or officer to sign vitiates affidavit. 436, 443 *note*.

JURISDICTION.

1. Bill filed by a foreigner against another foreigner, and against an English company formed for working a Russian mine, to restrain the English company from paying to a foreigner part of the profits of the mine which were claimed by the plaintiff, by way of commission, and also for an account of profits against the company.

Demurrer allowed. *Matthaei v. Galitzin*. 850, 857 *note*.

2. Matters on which the defect of jurisdiction depends may be apparent on the face of the proceedings, or may be brought before the Superior Court by

affidavit, but they must be extrinsic to the adjudication impeached.

3. Objections on the ground of defect of jurisdiction may be founded on the character and constitution of the inferior court, the nature of the subject matter of the inquiry, or the absence of some preliminary proceeding which was necessary to give jurisdiction to the inferior court.

4. The objection of defect of jurisdiction cannot be entertained if it rests solely on the ground that the judge has erroneously found a fact which was essential to the validity of his order, but which he was competent to try.

5. The principle acted on in *Rex v. Bolton*, that an adjudication by a judge having jurisdiction over the subject matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein, recognized and followed. *Colonial Bank v. Willam.* 225

See ADMIRALTY, 264.

ARBITRATION, 191.

ASSIGNMENT, 803.

SPECIFIC PERFORMANCE, 857 note.

L

LACHES.

See TRUST AND TRUSTEES, 858.

LANDLORD AND TENANT.

1. A lessee covenanted with the lessor not to assign the demised premises without the consent in writing of the lessor, "such consent not being arbitrarily withheld;" and it was provided by the lease that if the lessee should assign the premises without the consent in writing of the lessor, "but such consent is not to be arbitrarily withheld," the lessor might re-enter:

Held, that there was no covenant by the lessor, either express or implied, not to refuse his consent arbitrarily, but that an arbitrary refusal would leave

the lessee at liberty to assign without the lessor's consent.

2. *Semble*, by Kelly, C.B., and Pollock, B. An "arbitrary" refusal is equivalent to an "unfair and unreasonable" refusal; and a refusal "upon advice," though the grounds of refusal be not specified, is not "arbitrary." *Treloar v. Bigge.* 464

3. At Michaelmas, 1851, W., the owner of two adjoining houses, Nos. 4 and 5, let No. 5 to A., as tenant from year to year. Defendant having become tenant to W. of No. 4, A. let him the cellars under No. 5, from year to year from Michaelmas, 1861. There was in the front cellar a gas meter communicating with the house No. 5, and it was a term of the letting that A. should be allowed to go to the meter, if necessary, whenever defendant's premises were open. In July, 1871, it was agreed between A., W. and D., that A. should give up possession of No. 5 to W., and D. became tenant from year to year to W. from Michaelmas, 1871. Defendant was aware that No. 5 was given up by A., and relet to D., but no notice to quit the cellars was given to defendant. In March, 1872, D. put up in the cellars a water meter communicating with his house, without either objection or express permission of the defendant. Afterwards D. surrendered his interest in favor of the plaintiff, and W. let No. 5 expressly including the cellars, to the plaintiff for fourteen years, from the 24th of June, 1872. The plaintiff entered into occupation, the cellars remaining occupied by the defendant, and plaintiff, without objection or permission of the defendant, put up more pipes and some bell-wires in the cellars. In July, 1872, plaintiff demanded possession of the cellars, but defendant refused to give them up without a proper notice to quit, and he retained possession till April, 1873. On the 10th of January, 1873, the defendant cut off the plaintiff's water supply by hammering up the service pipes passing through the cellars, and cut the gas pipes and bell-wires. Plaintiff having brought an action for being kept out of possession of the cellars and for the damages caused by defendant's cutting the pipes, &c.:

Held, that defendant was entitled to keep possession until a proper notice to

quit had been given; for that the voluntary surrender by A. could not affect the interest of the defendant, his sub-lessee.

4. Secondly, that plaintiff was entitled to damages for the cutting of his pipes and wires; for that a licensee, under a revocable license, was entitled to notice of revocation and a reasonable time afterwards to remove his goods. *Millor v. Watkins*. 344, 349 note.

See DISTRESS, 495.

LEASE, 649.

NUISANCE, 817.

WASTE, 819, 825 note.

LEASE.

1. Where a lessee subject to a covenant not to assign without the lessor's consent, having obtained such consent, agreed to grant an underlease to contain the like provisions as the lease:

Held, that in the covenant in the underlease against assignment the original lessor was the person whose consent should be required. *Williamson v. Williamson*. 649

See LANDLORD AND TENANT, 464.
MINES, 585.

LEGACY.

1. A bill to set aside a deed containing charges of fraud which the court deems not to be proved, will be dismissed as to those charges, but need not be dismissed altogether, if there are other charges which the court deems to constitute what amounts to great irregularity and legal fraud, and to require the granting of the relief prayed for.
2. Where, in a bill to set aside the grant of an annuity made by A. to B., and charged upon A.'s land, with also a personal covenant for payment, the plaintiff is himself the devisee as well as residuary legatee under A.'s will, he ought, under the 20 & 21 Vict. c. 79, s. 68 (Ir.), to give notice to the other party that he intends to give in evidence, as proof of the devise or testa-

mentary disposition, the probate of the will. But if he should fail to give this notice, the omission would only create a technical difficulty in the case, and the court might, properly, and would adjourn the hearing to give an opportunity to remove that technical difficulty.

3. Where in such a case the objection was likewise made that the plaintiff was legatee and had not proved the assent of the executor to the legacy, nor his insolvency, nor his refusal to sue, nor collusion on his part; but the Vice-Chancellor overruled the objection, and the defendant, though carrying the case to the Court of Appeal in Chancery, did not present to that court this or the previous objection to the Vice-Chancellor's decision:

Held, that he could not afterwards, on bringing up the case to this house, present these objections in argument as objections which might be made here to the decision of the Court of Appeal. *Hilliard v. Eiffe*. 27

4. When specific and when residuary and when abates. 618
5. When charge upon real estate and when not. 744
6. Direction by codicil to executors to invest £200 and pay the proceeds to testator's daughter, a single woman, for life, for her separate use, and after her death, the capital to be for her children; with a proviso that if the bequest should be not "duly claimed" by the daughter within three calendar months after testator's decease, the bequest should lapse.
The legacy was not claimed by the daughter. She alleged that she did not hear of the legacy or of the testator's death till nearly two years after he died; and it was admitted by the executors that no notice was given to her by them:
Held, that the legacy had become forfeited, and had lapsed. *Porrell v. Rawle*. 781
7. When forfeited by failure to perform condition though not known to legatee. *Astley v. Earl of Essex*. 809
8. Devise of real estate upon trust for sale, and out of the proceeds of such sale to pay certain legacies

Held, that interest on the legacies was payable from the period of a year after the testator's death. *Turner v. Buck.* 816

9. A testator gave to several of his eight children real estates, and bequeathed his residuary personal estate to all the eight, with a direction that their portions should be equal, and to that end that those of them to whom he had given the real estates should respectively take them on account of their shares at the estimated values mentioned in his will. The executor absconded with the personal estate in his hands, but after many years a considerable part of it was recovered:

Held, that the amount recovered must be treated as consisting of a principal sum, with interest thereon at £4 per cent. per annum from the testator's death; that the devisees of the real estates must bring into account their estimated values as part of the principal; and that, the shares of principal having been thus ascertained, the part apportioned as interest must be divided between them in proportion to those shares. *Ackroyd v. Ackroyd.* 826

See CHARITY, 682.
ELECTION, 89.
WILL, 702.

LEGATEE.

1. When bound to repay personal representative proper portion of money received from. *Jervis v. Wolferstan.* 674

See LEGACY, 27, 781.
LIMITATIONS, STATUTE OF, 784.

LICENSE.

1. When may and when may not be revoked to prejudice of licensee; when licensor estopped and when not. 344, 349 note.

LIEN.

See ADMIRALTY, 264.

LIFE ESTATE.

1. A railway company having power to take compulsorily certain portions of an estate, served notices to treat for them. They afterwards abandoned part of their undertaking, including the land comprised in some of the notices, but took the rest and paid the purchase-money into court, the estate in question being the subject of a testamentary settlement. Before the abandonment certain costs, charges, and expenses had been incurred by the tenant for life under the settlement, and certain other costs were subsequently incurred in an unsuccessful attempt to obtain compensation for not going on with the notice to treat in respect to the abandoned portions:

Held, on a petition by the tenant for life for investment of the fund in court, that these costs, charges, and expenses might properly be paid out of the fund before investment. *Strathmore's Estate.* 848

See APPORTIONMENT, 840.

LIFE INTEREST.

See TENANT FOR LIFE, 611.

LIGHT.

1. There is no difference in the right of an owner of land to the ordinary easement of light, whether it is acquired by twenty years' user or by grant from the owner of the servient tenement; and if the grant is accompanied by a covenant for quiet enjoyment of the premises, such covenant does not enlarge the right of the covenantee so as to entitle him to an injunction in equity to restrain an obstruction where the damage is not sufficient to enable him to maintain an action at law.
2. But it is otherwise where the right to light claimed is not the ordinary easement, but a special right created by the covenant; in which case a court of equity will grant an injunction without regard to the amount of damage.

3. Where the court was not satisfied from the evidence whether the wall proposed to be built by the defendant would or not be a material obstruction to the plaintiffs' lights, the court directed a temporary screen to be erected to the height of the proposed wall, and appointed a surveyor to report on the effect. *Leech v. Schweder.* 559

LIMITATIONS, STATUTE OF.

1. Under a devise of land upon trust for sale, the proceeds to be considered as part of the personal estate, the trustees allowed part of the land to remain unsold for fifty years:

Held, that the trust was an express trust within sect. 25 of the Statute of Limitations, and a decree for the execution of the trust of the unsold land made at the suit of a residuary legatee. *Mulloy v. Bigg.* 784

2. A testator, by a will dated in 1824, devised all his real and personal estate, and also all other his estate and effects of which he might be possessed at the time of his decease, to his wife and another trustee, in trust to pay the rents to his wife for life, with remainders over. The testator purchased a freehold estate after the date of his will. On his death, his widow (the other trustee having disclaimed) became sole trustee of his will, and entered into possession of the after-acquired property, as well as the devised estate, believing that all the property passed by the will. She continued in possession for more than twenty years, and then, being informed that she had acquired a title by adverse possession, she sold the estate to a purchaser for value:

Held, upon bill filed by the remainderman under the will to oust the purchaser, that the tenant for life had acquired a good title by adverse possession against the remainderman, and the bill was dismissed. *Paine v. Jones.* 832

See TRUST AND TRUSTEES, 558.

LUNATIC.

1. A person who has become permanently insane, but has not been so found by inquisition, may maintain a suit by his

next friend for the protection of property in which he is interested as partner.

2. Permanent lunacy of a partner is a ground of dissolution at the instance of the lunatic as well as of the other partner.

3. A bill was filed by a next friend on behalf of a person of unsound mind not so found by inquisition, against the partner in business of the plaintiff, alleging that the plaintiff had for some time past been suffering from softening of the brain and was of unsound mind, and that it would be for his benefit that the partnership should be dissolved; and praying that the partnership might be dissolved and accounts taken, and the share of the plaintiff in the assets secured for his benefit, and for a receiver:

Held, on demurrer, that the suit could be maintained.

4. Whether a decree for final dissolution can be made in such a suit without the appointment of a committee in lunacy, *quære.*

5. The jurisdiction of the Court of Chancery with respect to suits instituted by persons of unsound mind, not so found by inquisition, by next friends, considered.

6. The articles of partnership between the plaintiff and defendant provided that either partner should be at liberty to determine the partnership at the end of the first seven years of the term, on giving previous notice to the other partner of his intention to do so. The plaintiff having become insane, the defendant served on him notice of his intention to determine the partnership at the end of the first seven years of the term:

Held, that the notice could not be withdrawn without the consent of the plaintiff. *Jones v. Lloyd.* 792

7. When property treated as real and when personal. 738, 743 *note.*

M

MALICE.

See CRIMINAL LAW, 501.

See CRIMINAL LAW, 501.

MARRIED WOMEN.

1. Under a testamentary appointment by a married woman of "all funds and property which have been or shall be purchased out of the savings of property to which I have been or shall be entitled to my separate use":

Held, that savings out of separate estate standing to her account at her bankers' did not pass. *Askew v. Rooth*. 615

See ELECTION, 39.

TENANT FOR LIFE, 611.

MARSHALLING ASSETS.

1. In the administration of the estate of a testator whose personal assets are deficient, specifically devised estates are not liable to contribute towards meeting the deficiency until the residuary real estate has been exhausted. *Lancefield v. Iggulden*. 653

MASTER AND SERVANT.

1. As to when owner not liable for negligence of pilot. 256
2. Plaintiff was a weaver employed by defendants as a weekly servant, his wages being regulated by the number of pieces which he wove and delivered to his masters. The wages of the defendants' workmen were ascertained and fixed at noon on Thursday in each week, but were not paid till the next Saturday. By rules embodied in the contract of hiring, the workmen were required to give, before leaving, fourteen days' notice at the time of booking-up on Thursday. "Persons leaving without notice will forfeit all wages due."

On a Thursday, the sum earned by the plaintiff in the preceding week, was ascertained and fixed at 15s. He commenced another week on the afternoon of the same day and worked during the

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morning of Friday, and earned 7s. He left during the forenoon of Friday without having given any notice:

Held, that the plaintiff forfeited, by leaving before the Saturday, the wages due on the Thursday, but not payable till the Saturday, as well as the wages earned between noon of Thursday and Friday morning. *Walsh v. Walley*. 338

See FACTORY, 335.

NEGLECT, 487.

PRINCIPAL AND AGENT, 202, 222 *note*.
WORK AND LABOR.

MINES.

1. By a lease of collieries in Cheshire, certain pits or mines, comprising the T. mine, which was the uppermost, the B. mine, which was the next, and the C. mine, which was the lowest, were, with other higher and intervening mines, demised to lessees with power to work and get coal from the same at a fixed rent, and with a covenant that they should work and carry on the mines with their utmost skill and ability, in the best and most effectual manner, to the best advantage, and according to the common mode and usual practice of carrying on coal works or collieries with effect.

On a bill by the lessor, alleging that the defendants, after having for some time worked the said three mines, had ceased working the T. mine, and also that they were working the C. mine in advance of the B. mine, and praying injunctions accordingly:

Held, that, under the terms of the covenant, the defendants were entitled to work any of the mines without working all, or all that they had commenced to work; that, according to the evidence before the court, it was the common practice in the district to work a lower seam of coal before working a higher; that there was no ground for saying that the defendants were committing a breach of the covenant; and the bill was dismissed with costs. *Lord Abinger v. Ashton*. 585

MORTGAGE.

1. The non-production, in Ireland, of title deeds to the solicitor instructed to

prepare a mortgage upon an estate there, will not of itself be deemed a proof that the solicitor has acted fraudulently, or even negligently, so as to affect the interests of his client. The construction to be put upon his conduct does not depend on an inflexible rule of law, but upon the circumstances of the case.

2. Where, therefore, the owner of an estate in Ireland had already created an equitable mortgage upon it by depositing the title deeds with a creditor, (which equitable mortgage was not registered); and, afterwards, on being asked for them by a solicitor who was about to prepare, for another creditor, a legal mortgage of the same estate, gave an excuse for their non-production, which, under the circumstances, appeared quite satisfactory, and also supplied in his own handwriting a summary statement of their contents; and the solicitor, in total ignorance of the equitable mortgage, and of all that had been previously done, prepared the legal mortgage, which was duly registered:

Held, that the legal mortgage had priority over the equitable mortgage, and was not assailable on the ground that the solicitor had improperly acted in preparing it without insisting on the production of the deeds:

3. *Per LORD SELBORNE*: It is inconsistent with the policy of the Irish Registration Law to impose on a mortgagee, or purchaser, the duty of inquiry with a view to the discovery of previous unregistered interests, but quite consistent with it, if he knows of the existence of those interests, to estop him from contending that, as to him, they are void merely because they are unregistered.
4. The doctrine of imputing in all cases the knowledge possessed by the solicitor to the client who employs him, considered.
5. Observations on the form of a decree for taking the accounts in such a case. *Agra Bank v. Barry*. 94, 114 note.

See CHattel Mortgage, 657.
DISTRESS, 873.

MUNICIPAL CORPORATION.

1. Liability of from sewers. 409
2. No warranty by, that work can be done according to plan of engineer. *Thorn v. City of London*. 475
3. When and how far liable for acts of officers, servants, fireman, etc. 222 note.
4. When officer cannot contract with. 367, 374 note.

See CITY.

N

NAVIGABLE RIVER.

See NUISANCE, 720, 726 note.
RIVER, 523, 530 note.

NEGLIGENCE.

1. Where a railway crosses a public highway on the level, and there are (under the 8 Vict. c. 20, s. 47) gates for the protection of "horses, cattle, carts, or carriages," passing along the highway, it is the duty of the railway company's servants to keep them closed when any train is approaching. If this duty is not performed, and a passenger along the highway is, in attempting to cross the line of railway, injured, the leaving of the gates open is, in an action brought by him, evidence of negligence to go to the jury. It is so, even though, with care and circumspection, he might have been able to see, at a distance, the approach of the train which occasioned the injury.

Per THE LORD CHANCELLOR (Lord Cairns): The gates of the railway, at a place where it crossed the highway at a level, being open, amounted to a statement, and a notice to the public, that the line, at that time, was safe for crossing. *North Eastern, etc., v. Wainless*. 1

2. B. was in the last carriage of a railway train. Before reaching the station at which he was to alight the train had to pass through a tunnel. In that tun-

nel there was, first, a heap of hard rubbish lying by the side of the rails, irregular in form and height, then a short sloping piece of ground, then a piece of flat platform, like the main platform, but narrower, and within the tunnel. Beyond these was the main platform itself. The train only partially went up to the main platform, leaving the last two carriages within the tunnel, which had no light within it, and on the occasion in question was filled with steam. The last carriage but one came opposite the narrow platform, the last carriage was opposite the hard rubbish. A passenger in the last carriage but one (who was called as a witness at the trial) heard the name of the station called out in the usual way and got out upon the narrow platform. He then heard a groaning, and proceeding farther back into the tunnel found B. lying on the rubbish with his legs between the wheels of the last carriage, but neither of them had touched him. B.'s leg was broken, and he had received other injuries, from the effects of all which he died. The witness heard the warning, "Keep your seats," and shortly afterwards the train moved on.

On these facts the learned judge at the trial held that there was no evidence of negligence to go to the jury, and he directed a nonsuit. Owing to a strong expression of opinion by the jurymen he took their finding (on the assumption that there ought to be a verdict for the plaintiff) as to the amount of damages. The nonsuit was then entered, with leave to move to enter the verdict for the damages assessed:

Held, that the ruling at Nisi Prius could not be sustained; that the case ought not to have been withdrawn from the consideration of the jury, for that the evidence furnished matter on which it was necessary to take the opinion of a jury.

3. *Quare*, whether calling out the name of a station is an invitation to the passengers, going to that station, to alight there. *Bridges v. Directors, etc.* 165

4. Where it is the duty of the zemindar to maintain the tanks on his zemindary, which are part of a national system of irrigation, recognized by the laws of India as essential to the welfare of the inhabitants, and the banks of a tank are washed away by an extraordinary flood without negligence on his part:

Held, that the zemindar is not liable for any damage that may be occasioned by the overflow of the water. *Madras, etc., v. Zemindar, etc.* 289

5. In the absence of negligence on their part, a vestry or local board is not responsible for any injury resulting to an individual from the disrepair of a sewer.

6. Sect. 72 of the Metropolis Local Management Act (18 & 19 Vict. c. 120) imposes upon the vestry or local board the duty of properly cleansing the sewers vested in them by the act. Under the premises of the plaintiff was an old drain which by reason of other houses draining into it had become a "sewer." This drain having become choked, the soil therefrom flowed into the cellar of the plaintiff, a publican, and did damage. In an action against the vestry, founded upon a breach of the duty imposed upon them by s. 72, but not charging negligence, the jury found that the existence of the drain was unknown to the defendants; that its existence might have been known to them by the exercise of reasonable care and inquiry; but that the obstruction of the drain was unknown to the defendants, and could not by the exercise of reasonable care have been known to them:

Held, that, upon these findings, the defendants were entitled to the verdict; and that the declaration disclosed no cause of action. *Hammond v. Vestry, etc.* 409

7. How much proof of by child requisite, when child guilty of, and when of parent attributable to. 469, 474 *note*.

8. The defendants' line crossed a public footpath on the level; but the defendants had not erected any gate or stile, as provided by 8 & 9 Vict. c. 20, s. 61.

The plaintiff, a child of four years and a-half old, having been sent on an errand, was shortly afterwards found lying on the level crossing, a foot having been cut off by a passing train:

Held, that there was evidence to go to the jury that the accident was caused by the neglect of the defendants to fence. *Williams v. Great Western.*

469, 474 *note*.

9. The plaintiff, a platelayer in the employment of a railway company, was

returning from his work along their line upon a trolley propelled by hand, when the defendant's pigs got through the fence of his field, which adjoined the railway, on to the line in front of the trolley; the trolley ran over the pigs and was upset, and the plaintiff was injured.

The defendant was owner of the adjoining land; the fence erected by the company under 8 Vict. c. 20, s. 68, was sufficient against horses, oxen and sheep; but there was enough space between the lowest rail of the fence and the ground for pigs to crawl through, and the defendant's pigs had in fact (as the jury found) crawled under the fence. There was evidence to show that the defendant had been warned on a former occasion of his pigs being on the line, but there was no evidence to show how the pigs got from defendant's farm yard, where they were last seen, into the field adjoining the railway. In an action against the defendant for the injury sustained by the plaintiff:

Held, first, that the word "cattle" in 8 Vict. c. 20, s. 68, included pigs, and that the fence was, therefore, insufficient.

10. Secondly, that, assuming there was negligence in the defendant, the plaintiff could not recover, for that he was identified with the company whose line he was using for their purposes, and through whose neglect to erect and maintain a sufficient fence the accident was caused. *Child v. Hearn*. 487

See ADMIRALTY, 256.
RAILWAY COMPANY.

NOTICE.

See BONA FIDE, 114 *note*.
BONA FIDE PURCHASER, 756.
DISTRESS, 495.
MORTGAGE, 94, 114 *note*.
SPECIFIC PERFORMANCE, 543.

NUISANCE.

1. By interference with watercourse. 556 *note*.
2. Upon an information filed by the Attorney-General to restrain a public body

from transgressing powers conferred by an act of Parliament, it is not necessary to prove that injury to the public will result from the acts complained of; and in this respect there is no difference between an *ex-officio* information and an information at the relation of a private individual.

3. The Local Government Act (1858) Amendment Act, 1861 (24 & 25 Vict. c. 61, s. 4), enables local boards to execute works without their districts for the purpose of the outfall or distribution of sewage, subject to the following proviso: "That nothing herein contained shall give or be construed to give power to any local board to construct or use any outfall, drain, or sewer for the purpose of conveying sewage or filthy water into any natural watercourse or stream until such sewage or filthy or refuse water be freed from all excrementitious or other foul or noxious matter, such as would affect or deteriorate the purity and quality of the water in such stream or watercourse":

Held, that a local board is not entitled to discharge sewage by an outfall out of their district into a river so as to affect or deteriorate the water at the point of discharge.

4. The C. local board discharged sewage into a river by an outfall out of their district so as to pollute the water at the point of discharge; but such pollution was imperceptible at the town of W., situated eight miles farther down, and supplied with water for domestic purposes from the river. Upon an information and bill filed by the local board of W. (in whom the W. water-works were vested), as relators and plaintiffs seeking to restrain the C. local board from so discharging the sewage, on the ground that their acts were, first, an infringement of the above-mentioned provisions of the Local Government Act, 1861, and secondly, a nuisance to the inhabitants of W.:

Held, that upon the information an injunction to restrain the defendants from infringing the act of Parliament must be granted with costs; but that the bill, which sought to make out a case of nuisance, must be dismissed with costs. *Attorney-General v. Cockermouth Local Board*. 720, 726 *note*.

5. Where the occupier of lands grants a license to another to do certain acts on the land, and the licensee in doing them commits a nuisance, the occupier may be made a defendant to a suit to restrain the nuisance. *White v. Jameson*. 817

See RIVER, 528, 530 note.

O

OFFICER.

1. When public officer personally liable upon contracts and when not. 1, 14 note, 64
2. By s. 77 of 4 & 5 Wm. 4, c. 76, "it shall not be lawful for any person hereafter to be appointed in any parish or union to any office concerned in the administration of the laws for the relief of the poor, or for any person who shall fill any such office, to furnish or supply for his own profit or on his own account any goods, materials, or provisions ordered to be given in parochial relief to any person in such parish or union. . ."

The appellant was a guardian of the poor for N. Union; he was also a cabinet maker, and carried on business with D. as D. & Son; an application was made to the board of guardians for clothing and a bedstead for an out-door pauper of the union, and an order made by the guardians for clothing only; the relieving officer purchased from D., at the shop of D. & Son, a bedstead, which was delivered by D. at the house of the out-door pauper; the bedstead was only lent to the pauper by the guardians and remained their property; D. knew, but the appellant did not know, that the bedstead was purchased for the guardians and was to be supplied to the pauper by way of parochial relief:

Held, 1. That a guardian of the poor of a union is a person appointed to an office within the above section. 2. That the appellant was liable to be convicted under the above section, although he had not knowledge that the bedstead was to be given in parochial relief; and that it was immaterial whether the relieving officer to whom the bedstead was sold was authorized to purchase it. 3. That the bedstead, having been supplied gratuitously in the way of paro-

chial relief, was "given in parochial relief" within the above section. *Davies v. Harvey*. 367, 374 note.

P

PARENT AND CHILD.

1. When negligence of parent attributable to child. 469, 474 note.

PAROL EVIDENCE.

See BONA FIDE PURCHASER, 756.
FRAUDS, STATUTE OF, 405.

PARTIES.

1. When different owners of watercourse may join. 556 note.

See INFANT, 603.
NUISANCE, 817.

PARTNERSHIP.

1. Rights of partners in case of lunacy of one and also in case of notice to terminate pursuant to articles of copartnership. *Jones v. Lloyd*. 792

PATENT.

1. The court will restrain a patentee from issuing circulars threatening legal proceedings against infringers unless he will undertake to commence proceedings to assert the validity of his patent; and the fact that the party seeking the aid of the court was formerly a licensee of the patent under the patentee, and had himself concurred in issuing similar circulars, does not prevent the court interfering after the expiration of the license. *Azmann v. Lund*. 841

PAYMENT.

See BONA FIDE, 114 note.

PERFORMANCE.

See MASTER AND SERVANT, 338.
VENDOR AND VENDEE, 393.

PERJURY.

See CRIMINAL LAW, 323.

PERSONAL ESTATE.

1. When real estate treated as.
738, 743 note.
See WILL, 744.

PILOT.

See ADMIRALTY, 256.

PLEADING.

1. In an action of deceit, whether against a person or against a company, the fraud of the agent may be treated for the purposes of pleading as that of the principal. *Mackay v. Commercial Bank.*
202.

POWER.

1. The doctrine of *Greville v. Browne*, viz., that a gift of legacies, followed by a gift of the residue of the real and personal estate, charges the legacies on the residuary real estate, is applicable to a gift of legacies followed by a gift of residue of all the property of the testator, and over which the testator has a power of appointment, though the power be special and non-exclusive;

and in such a case the legacies are charged on property subject to a power of appointment.

2. A testatrix, having power to appoint certain funds by will in favor of A., B., C., D., and E., in such parts, shares, and proportions as she might think fit, and having no other power, by her will gave legacies of £5 each to A., B., and C., and all the residue of her property, of whatever kind and wheresoever situate, and over which she had any power of appointment, to D., and E., and died leaving some personal estate of her own:
Held, that the will was a valid execution of the power. *Gainsford v. Dunn.*
607

See TRUST AND TRUSTEES, 579.
WILL, 629.

PRESUMPTION.

1. Where a public company has been incorporated by virtue of a statute which prescribed certain rules for the constitution of such companies, and for regulating their proceedings, it will be assumed, in judging of the transactions between the company and other parties, that the requirements of the statute have been complied with.
2. It is not incumbent on a person lending money to a joint stock company to ascertain that all the proceedings of the company and its shareholders, *inter se*, have been strictly regular. *Colonial Bank v. Willan.*
225, 255 note.

PRINCIPAL AND AGENT.

1. When agent liable personally, when not, when principal liable and when not, upon contracts. 1, 14 note, 64.
2. A board of health had been formed in a town. L. was its chairman. M., a contractor, had, under the orders of the board, formed a main sewer in the town, and, under the orders of the board, had purchased pipes which would be required to be used in making the connecting drains between certain private houses and the main sewer.

The board had, under the 11 & 12 Vict. c. 63, s. 69, given notice to the inhabitants of certain streets to make these connecting drains, the effect of the notice being that if the said inhabitants did not make those connecting drains the board might make them and charge the expenses on the defaulting inhabitants. The notice was disregarded. No subsequent resolution was passed by the board. M. was about to take away his carts and working materials, when L. said to him, "What objection have you to making the connections?" to which M. answered, "None, if you or the board will order the work, or become responsible for the payment;" and L. replied, "M., go on and do the work, and I will see you paid." M. did the work, and, the board refusing to pay, sued L. for the amount:

Held, that the words of L. were properly left to the jury as evidence to sustain a claim against him personally, and that they did not constitute a promise to pay the debt of another, so as to come within the operation of the Statute of Frauds.

3. *Per LORD SELBORNE*: There can be no suretyship unless there be a principal debtor, existing at the time, or constituted by matters *ex post facto*. *Lakeman v. Mountstephen*. 5, 14 note.
4. A master is answerable for every such wrong of his servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved; and there is no distinction between the case of fraud and the case of any other wrong.
5. Where one party has suffered, and another has profited by, the fraudulent representation of an agent of the latter made within the scope of his authority, the former is entitled to recover damages.
6. An action of deceit may be maintained against a company, whether incorporated or not incorporated, in respect of the fraud of its agent.
7. An officer of a banking corporation, whose duty it was to obtain the acceptance of bills of exchange in which the bank was interested, fraudulently, but

without the knowledge of the president or directors of the bank, made a representation to A. which, by omitting a material fact, misled A., and induced him to accept a bill in which the bank was interested; and A. was compelled to pay the bill:

Held, that A. could recover from the bank the amount so paid. *Mackay v. Commercial Bank*. 202, 222 note.

See ADMIRALTY, 422.
BONA FIDE, 114 note.
BROKERS, 729.
PLEADING, 202.

PROTEST.

1. A. in London drew a check on B. & Co., bankers at Jersey, in favor of C., on the 27th of January, and C. handed it to a London bank on the 28th, who, having no agent at Jersey, the same day sent the check by post direct to B. & Co. demanding payment. The check in due course of post would have arrived at Jersey on the 29th. B. & Co. stopped payment on the 4th of February, and on the 7th of February returned the check marked "refer to drawer." By the custom of London bankers, when a foreign check is paid to a banker by a customer, if the banker has no agent at the place where the check is payable, he sends the check direct to the banker on whom it was drawn demanding payment, and the banker immediately either remits the money or returns the check; checks drawn on bankers in Jersey are considered foreign checks:

Held, that there was a due presentment for payment of the check according to the custom of bankers; and that C. had been guilty of no laches so as to make the check his own. *Heywood v. Pickering*. 863

Q

QUIA TIMET.

See INJUNCTION, 786.

R

RAILWAY COMPANY.

1. Where a railway company construct their line across a highway on a level under the sanction of an act of Parliament, it is their duty to keep the crossing in a proper state for the passage of carriages across the rails; and if a carriage is damaged in consequence of the rails being too high above the surface of the roadway, the company are liable. *Oliver v. North Eastern, etc.* 350

See CARRIERS, 409.

LIFE ESTATE, 848.

NEGLIGENCE, 1, 165, 469, 474 *note*, 487.

REAL ESTATE.

1. When personal property treated as. 738, 743 *note*.

See ELECTION, 89.

RECORD.

See MORTGAGE, 94, 114 *note*.

RECORDING ACTS.

See CHATTEL MORTGAGE, 657.

REDEMPTION.

See BONA FIDE PURCHASER, 756.

REMAINDERMAN.

See LIMITATIONS, STATUTE OF, 832.

REMOVAL.

See CERTIORARI, 323.

RENT.

See APPORTIONMENT, 840.
DISTRESS, 873.
UNBORN CHILD, 668.
WILL, 744.

RES ADJUDICATA.

See FRAUD, 225.

RESCISSION.

See VENDOR AND VENDEE, 393.

RESIDENCE.

1. The claimant, a freeman of a borough, was an officer in the army serving with his regiment. When he obtained leave of absence, which he usually did for three months in the year, he used to reside at the house of his mother, within seven miles of the borough, occupying apartments there, which were always reserved for his use. He was unmarried, and had no other home than his mother's house:

Held, that in the case of an officer subject to the will and pleasure of the Queen, and who was therefore not *in jure*, there could not be such an intention of returning as to constitute a constructive residence, and consequently that the claimant was not qualified. *Ford v. Hart*, 400

REVENUE.

1. By the Tyne Coal Dues Act, 1872 (35 Vict. c. xlii.), the old coal dues are abolished, and the commissioners are empowered to levy dues, *inter alia*, one penny per ton on "coals exported from the port":

Held, that, in the absence of anything in the act to the contrary, "exported from the port" must be taken to be used in its ordinary meaning of "carried out of the port;" and there-

fore included coals taken out of the port in a steamer to be consumed on board during a distant voyage. *Muller v. Baldwin*. 389

RIVER.

1. A wharf-owner drove piles into the bed of a river, extending the wharf so as to occupy three feet out of a breadth of about sixty feet available for navigation :

Held, that this was such an obstruction as would be restrained at the suit of a municipal corporation empowered by act of Parliament to remove obstructions.

2. *Held*, per the Master of the Rolls, that an owner of land at the side of a public navigable river has no right to erect on the bed of the river, for the benefit of his own trade, any structure, whether any actual obstruction to the navigation of the river will or will not be thereby occasioned; and any benefit to his own trade is too remote to be held for the advantage of the public generally, and so to justify the erection. *Attorney-General v. Terry*, 523, 530 note.

See NUISANCE, 720, 726 note.

S

SALE.

See FRAUDS, STATUTE OF, 405.
VENDOR AND VENDEE, 393.

SATISFACTION.

See COMPROMISE, 515, 523 note.

SENTENCE.

See CRIMINAL LAW, 323.
9 ENG. REF.

SET-OFF.

See WILL, 744.

SETTLEMENT.

See COMPROMISE, 515, 523 note.

SEWERS.

See NEGLIGENCE, 409.
NUISANCE, 720, 726 note.

SPECIFIC PERFORMANCE.

1. Of agreement to insure, when decreed and when not. 361 note.

2. The conditions of sale of a public-house stated that it was in the occupation of a tenant. A brewer, intending to use the public-house for the sale of his beer, agreed to buy it. He afterwards learnt that it was under lease to another brewer for a term of which eight years were unexpired:

Held, (affirming the decree of the Master of the Rolls), that the purchaser was not bound to ascertain from the tenant the terms of his tenancy; and that in such a case the vendor could not enforce specific performance. *Caballero v. Henty*. 543

3. Courts of one country have to decree of lands in another though is matter of discretion. 857 note.

See FRAUDS, STATUTE OF, 661, 664.

STOCKHOLDERS.

See DIRECTORS, 64.

SUBROGATION.

1. When insurers have a right to against carrier or wrong-doer. 576 note.

When creditor holds collateral policy
for debtor. 576 *note*.

T

TECHNICALITY.

See DISTRESS, 873.

TENANT FOR LIFE.

1. Where a fund producing income is given absolutely to a married woman, and the gift is followed by a restraint on anticipation, the married woman is prevented from alienating the fund during coverture.

2. A testatrix, by her will, gave to a married woman a sum of consols; and by a codicil directed that all gifts and provisions (whether absolute or limited) thereby or by her will made for any female should be for her separate use, and (whilst she should be under coverture) without any power of anticipation. The executor transferred the fund into court under the Trustee Relief Act, and the married woman presented a petition for a transfer of the fund to herself:

Held, that she could only have the income paid to her during her coverture.

3. As to the effect of a clause restraining anticipation on an absolute gift of a fund not producing income, *quære*. *Matter of Ellis's Trust*. 611

TENANTS IN COMMON.

See DISTRESS, 873.

TITLE.

See DEVISE, 309.

LIMITATIONS, STATUTE OF, 832.

TOMBSTONES.

See CHARITY, 685.

TRADE-MARK.

1. Bill by traders, praying for a declaration of their right to a certain trade-mark, and for an injunction to restrain defendants from using a brand alleged to be an imitation of it, dismissed with costs, there being no evidence of actual deception, and no such imitation of the plaintiffs' trade-mark as, in the opinion of the court, made deception probable. *Cope v. Evans*. 689

TRIAL.

See CRIMINAL LAW, 323.

TRUST.

1. When creditor holds collateral policy in trust for debtor. 576 *note*.

TRUST AND TRUSTEES.

1. When one entitled to use of property not entitled to transfer of estate. 611

2. A gift of an annuity to a trustee, so long as he should continue to execute the office of trustee:

Held, to determine on the cesser of active trusts by the payment of the whole of the trust property to a person absolutely entitled, without a devolution of the office of trustee on any other person. *Hull v. Christian*. 647

3. Testator devised his real estate to trustees, in trust for his wife for life, with remainder to F. for life, with remainders over, and with a power of sale, at the discretion of the trustees or trustee for the time being, and with the usual power for the surviving or acting trustee or trustees, with the consent of the tenant for life, to appoint new trustees. The sole acting trustee appointed the testator's widow and F. new trustees jointly with himself. F. being sole surviving trustee contracted for the sale of part of the property:

Held, that the power to appoint new trustees had been well exercised, there

being nothing in the will to prevent the appointment of a tenant for life as trustee; and that F. could make a good title to the property, which the court would enforce upon a purchaser. *Forster v. Abraham*. 579

4. D., who was possessed of leasehold business premises and stock-in-trade, shortly before his death purported to make a voluntary gift in favor of his grandson E., who was an infant and who assisted in the business, by the following memorandum, signed and indorsed on the lease: "This deed and all thereto belonging I give to E. from this time forth, with all the stock-in-trade." The lease was then delivered to E.'s mother on his behalf:

Held, that there was no valid declaration of trust of the property in favor of E. *Richards v. Delbridge*. 669

5. A trustee who accepts office at the request of a *cestui que trust* is entitled to be indemnified by that *cestui que trust* personally against all loss which may accrue in the proper execution of the trust.
6. Notice of a remote contingent liability on the part of a testator is not sufficient to prevent his executor from distributing his residuary estate; and if the executor distributes with such notice, and the liability afterwards ripens into a debt, he will be entitled to call on the residuary legatees to refund.
7. The executors of a testator had during his lifetime, and at his request, become trustees of a deed, whereby certain shares in an unlimited company were settled on a tenant for life, with remainders over. While the company was a going concern, and believed to be perfectly solvent, they distributed the residuary estate: afterwards the company was ordered to be wound up. Large calls were made in respect of the shares, and the remaindermen all disclaimed:

Held, that the trustees and executors were entitled to be indemnified out of the testator's estate, and to call on the residuary legatees to refund.

8. A person who has covenanted to bequeath or otherwise provide that a share of his estate shall go to the covenantee fulfils his covenant by bequeathing the

share to the covenantee, who then stands in the same position as any other legatee.

9. The above-mentioned testator had, by the settlement made on the marriage of one of his daughters, covenanted to bequeath or otherwise provide that a certain share of his residuary estate should go to her; and it was by the same settlement agreed that such share should be paid to the trustees and held by them on the trusts of the settlement. The testator accordingly bequeathed the proper share to his daughter, and it was paid by the executors to the trustees of the settlement:

Held, that the trustees were liable to refund equally with the other residuary legatees.

10. An executor who compels a legatee to refund can recover only the capital sum which he has paid to the legatee, without any intermediate income. *Jervis v. Wolferstan*. 874

11. The estate of a testator who died in 1832 was distributed in 1847, as the evidence showed, at the written request of the persons beneficially entitled. Another part of the estate which fell in in 1852 was distributed also at the request, but not in writing, of the beneficiaries, and in 1871 the acting trustee died. No accounts or vouchers were forthcoming from the trustees.

Bill, filed in 1872 by one of the beneficiaries and her husband against the surviving trustee, and the representative of the deceased trustee, for administration, dismissed; but owing to the negligence of the trustees in not keeping accounts and vouchers, without costs. *Payne v. Evans*. 858

See APPORTIONMENT, 840.

BONA FIDE PURCHASER, 756.

CHARITY, 685.

LIFE ESTATE, 848.

LIMITATIONS, STATUTE OF, 784, 832.

TENANT FOR LIFE, 611.



UNBORN CHILD.

1. Devise to trustees to the use of the first and other sons of M. in tail male,

with a residuary devise. Three months after the testator's death the first son of M. was born:

Held, that the residuary devisees were entitled to the intermediate rents from the testator's death to the birth of the tenant in tail. *Matter of Mowlem*. 668

2. When property treated as real and when personal. 743 *note*.

UNDERLETTING.

See LEASE, 649.

USAGE.

See ADMIRALTY, 443.
BROKERS, 727.
MASTER AND SERVANT, 388.
PROTEST, 368.

V

VENDOR AND VENDEE.

1. The defendant contracted to sell to the plaintiffs 250 tons pig-iron at 56s. per ton, half to be delivered in two, remainder in four weeks; payment, net cash fourteen days after delivery of each parcel.

The market was rising, and, notwithstanding urgent demands by the plaintiffs, the delivery of the first 125 tons was not completed for nearly six months. The plaintiffs refused to pay for the first parcel, claiming a right to set off the loss they had sustained from being obliged to procure other iron in consequence of the defendant's default; but they still urged the delivery of the second parcel. The defendant, treating the refusal to pay as a breach and an abandonment of the contract by the plaintiffs, declined to deliver any more. There was no suggestion of inability on the part of the plaintiffs to pay, and the price of the first parcel was ultimately paid: *Held*, that the mere refusal to pay for the first parcel did not, under the circumstances, war-

rant the defendant in treating the contract as abandoned and refusing to deliver the remainder, and that the plaintiffs were entitled to damages for the breach. *Freeth v. Burr*. 393

See CONVERSION, 743 *note*.

DAMAGES, 116, 164 *note*.

FRAUDS, STATUTE OF, 405, 729.

SPECIFIC PERFORMANCE, 543.

W

WAIVER.

1. The Judicial Committee are unwilling to send a case for re-trial, or to decide it, upon points which have been raised for the first time at their bar, and which possibly may have been treated as agreed upon, or too clear for argument, in the court below. *Mackay v. Commercial Bank*. 202

See LEGACY, 27.

WARRANTY.

1. None by contractor that work can be performed according to plan of engineer. *Thorn v. City of London*. 475

See FRAUD, 64.

WASTE.

1. Although a tenant for life subject to impeachment for waste cannot cut timber at all (except periodically on a timber estate), or, as a general rule, trees which would become timber if they were of the age of twenty years or upwards, yet he may cut down timberlike trees under twenty years of age for the necessary purpose of preserving or allowing the growth of other trees, and is entitled to the proceeds of such cuttings.
2. Where timber is cut down or blown down the property in it belongs to the owner of the first estate of inheritance.

3. Where the court orders timber to be cut for any reason, the proper course is for the proceeds to be invested, and the income given to the successive owners of the estate until there is an absolute estate of inheritance, the owner of which is entitled to the principal; and the same rule applies to cases of equitable waste.

4. A tenant for life is entitled at law to the proceeds of trees (not timber) cut by him, whether rightfully or wrongfully, though liable in the latter case to an action of waste; but, *semble*, equity would not allow him to retain the proceeds of wrongful cuttings.

5. Local custom as to timber observed upon. *Honywood v. Honywood*, 819, 825 note.

WATERCOURSES.

1. A canal company, having under their act power to supply their canal with water from the neighboring streams, bought a mill and turned the mill stream into the canal. Many years afterwards a water-works company diverted part of the mill stream, and thereby supplied with water a neighboring town:

Held, that the canal company, both under their act and as owners of the mill, were riparian proprietors, and had power to prevent the unlawful use of the water by other riparian proprietors, and that the supply of a neighboring town was such an unlawful use:

2. *Held*, that as the defendants claimed a right so to use the water, the plaintiffs were not (in order to support their bill) obliged to prove actual damage to the canal:

3. *Held*, that the canal company had not a right to require more water than they wanted for the purposes of the canal.

4. *Seemle*, nevertheless, that the canal company might sell any surplus water which remained after they had used it for the purposes of the canal. *Wilts, etc., v. Swindon, etc.* 546, 556 note.

5. Remedy for interference with, pollution of, etc. 556 note.

See NUISANCE, 720, 726 note.

WAY.

See COVENANT, 449.

WILL.

1. A gift by a testator or testatrix to his or her unborn child by a particular person not being the wife or husband of the testator or testatrix, is good, provided the child has acquired the reputation of being such before the death of the testator or testatrix.

2. Where, therefore, a testatrix who had gone through the ceremony of marriage with P., the husband of her deceased sister, bequeathed her residuary estate, upon trust for all her children by P., and died eight years after the date of the will, leaving two children, one of whom was born at the date of the will, and the other only a few weeks before the death of the testatrix:

Held, that the second child, having before the death of the testatrix acquired the reputation of being her child by P., was entitled to share in the estate. *Matter of Goodwin's Trust.* 577

3. By deed and by will two funds of £37,914 and £800 consols were settled, with powers of varying investments, upon trusts for the nephews and nieces of R. H., subject to a power in R. H. of exclusive appointment among them. R. H. made and revoked a series of appointments, and ultimately, by a deed-poll in November, 1870, (at which time the fund had been reduced to £27,170 consols and £8,000 cash), R. H., after reciting a desire to revoke the subsisting appointment of the two funds, and to appoint the same amongst his nephews and nieces named, in the shares and proportions and in manner expressed, in pursuance of that desire appointed that the trustees should stand possessed of the two funds "or other the stocks, funds, and securities" of which the same then consisted, or thereafter should or

might consist, or upon which the same or any part thereof was then or thereafter should or might be invested, upon trust as to £7,000 consols, part of the £37,914 and £800 consols, or other the stocks, funds, or securities of which the same might consist, for his nephew, S. H., absolutely. R. H. then appointed in like manner further sums (making an aggregate of £37,000 consols), in trust for the four nieces and nephew named; and the residue of the two several sums of consols or other the stocks, funds, or securities, &c., in trust for his niece C. The trust funds at the death of R. H. were insufficient to pay the £37,000 consols:

Held, that the gift to C. was residuary and not specific, and that it failed altogether. *De Lisle v. Hodges.* 618

4. A testator gave all his real and personal property to his wife, M. D., in trust to apply the same to her own personal use for life, and he left her at liberty to dispose of the property amongst their children by will as she should think fit; and, should she make no will, he desired that the property existing at her death should be divided equally between his children by her. The testator had two illegitimate children by M. D., who were recognized by him and baptized as his children, and he had married her the day before he made his will. There were no children born after the marriage:

Held, that the two illegitimate children were the objects of the power of appointment to M. D., and that they would take as the children of the testator by her in default of her executing the power. *Dorin v. Dorin.* 629

5. Testator gave all his real and personal estate to trustees upon trust, after paying his debts, to pay the residue of his personal estate to his wife for her own absolute use and benefit, and the rents and annual income of his real and leasehold estates to her during her life; and after making provision for certain legatees and annuitants, he gave his freehold estate, after the death of his wife, to his grandson, and all the money (if any) that should be remaining after payment of his wife's just debts, he gave to legatees named as tenants in common, equally. The widow died shortly after the testator, intestate:

Held, that she took an absolute inter-

est in the residuary personal estate, and that it belonged to her next of kin. *Perry v. Merriitt.* 702

6. A testator having directed his debts and legacies (other than charitable legacies) to be paid out of impure personality, and his charitable legacies out of pure personality, the following points were decided:

The testator borrowed £8,500 from his bankers, to be repaid on a specified day. He died before the day of payment, and at his death a sum of £629 was standing to his credit, on his current drawing account:

Held, that the £629 must be treated as a set-off against the sum due on the loan account, and was not to be dealt with as an asset in the hands of the executors.

7. At the death of the testator a sum of £90 for rents collected, but not paid over, remained in the hands of his agent, and a larger sum was due to the agent for commission on rents collected:

Held, that the £90 must be set off against the larger sum due for commission, and was not to be treated as an asset of the testator.

8. There was also a sum of £861 due to the testator as arrears of rent from leaseholds, in respect of which ground-rent and other outgoings were payable:

Held, that the arrears of rent due were not liable to reduction for ground-rent and outgoings, but must be treated as pure personality.

9. There was a further sum of £2,202 due for the apportionment of the quarter's rent of leasehold estates:

Held, that this was pure personality.

10. The will contained a bequest of £200 to each of ten poor clergymen of the Church of England, to be selected by his friend, J. O.:

Held, that these were charitable legacies, but were payable out of the testator's general estate.

11. Gift by will of legacies of £200 each to twenty charitable institutions, followed by a gift by a codicil as follows: "Presuming and believing that the rental of my estate will produce from £16,000 to £18,000, I desire the four executors named at the top of my will will appropriate £4,000 more to the es-

established institutions of the country, making it together £8,000:

Held, that the gift was conditional on the income of the estate amounting to the specified sum, and that not being the case the gift failed. *Thomas v. Howell*. 744

See DEVISE, 309.

LIMITATIONS, STATUTE OF, 832.
MARRIED WOMAN, 615.

WORDS.

"Arbitrary refusal,"	464
"Cattle" includes "pigs,"	487
"Children" means "illegitimate" children,	577, 629
"Consent arbitrarily withheld,"	464
"Exported from,"	389
"Factory."	385
"Funds and property out of savings of separate estate,"	615
"Owner's risk,"	409
"Party or privy,"	449
"Place,"	374, 429
"Refusal, arbitrary."	464

WORK AND LABOR.

1. The defendants being about to erect a

bridge, an engineer prepared for them, at their request, certain plans and specification both of the bridge and of the mode in which it was to be constructed. The plaintiff, on the faith of these plans and specification, and without any independent inquiry whether the work could be done as specified, entered into a contract with the defendants to do it in accordance with the terms of the plans and specification. After the plaintiff had incurred great expense, it was found that the work could not be executed in the manner specified. The plaintiff sued the defendants on the ground of an implied warranty by them that the work could be executed in the manner described in the plans and specification:

Held, that no such warranty could be implied. *Thorn v. City of London*. 476

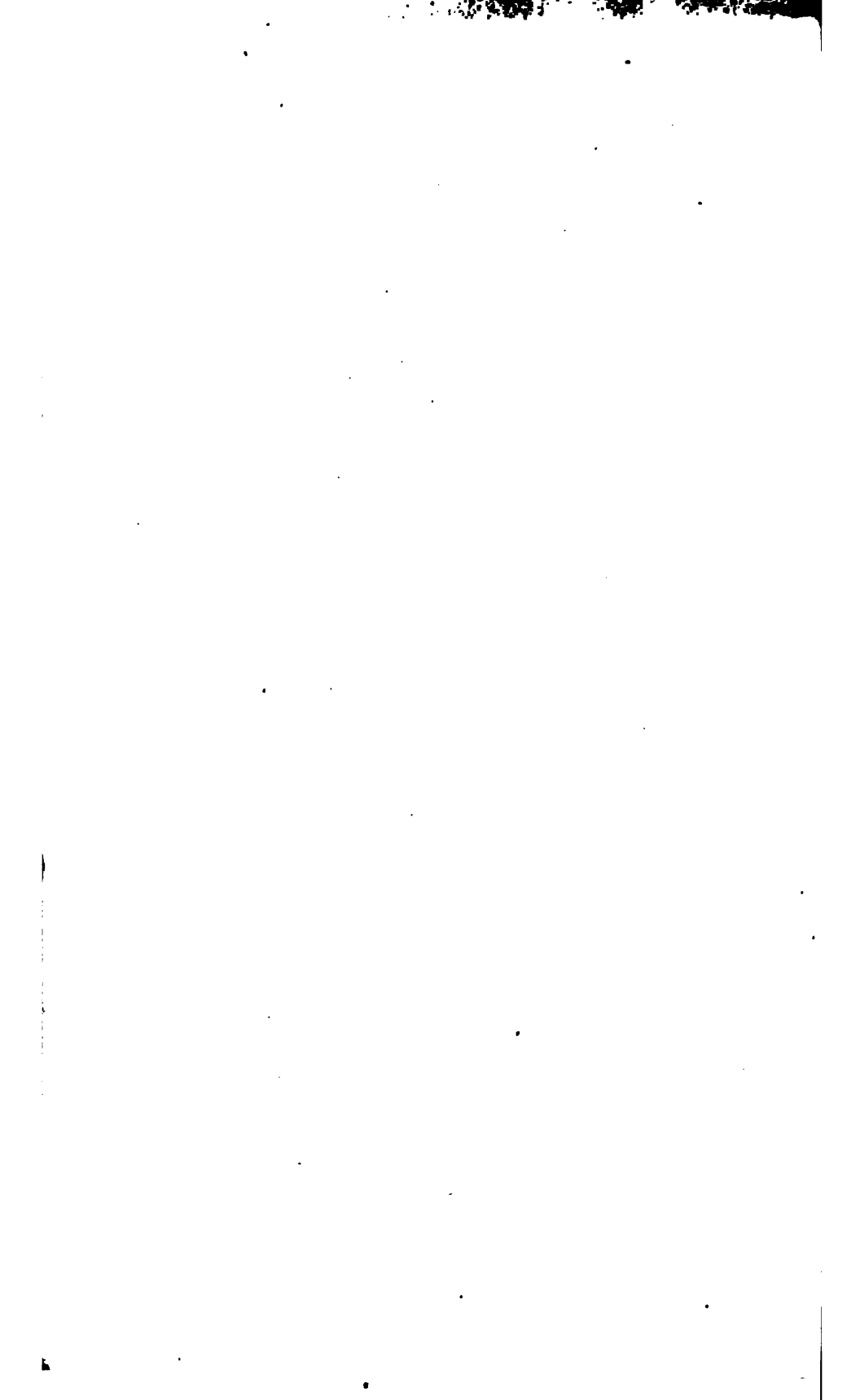
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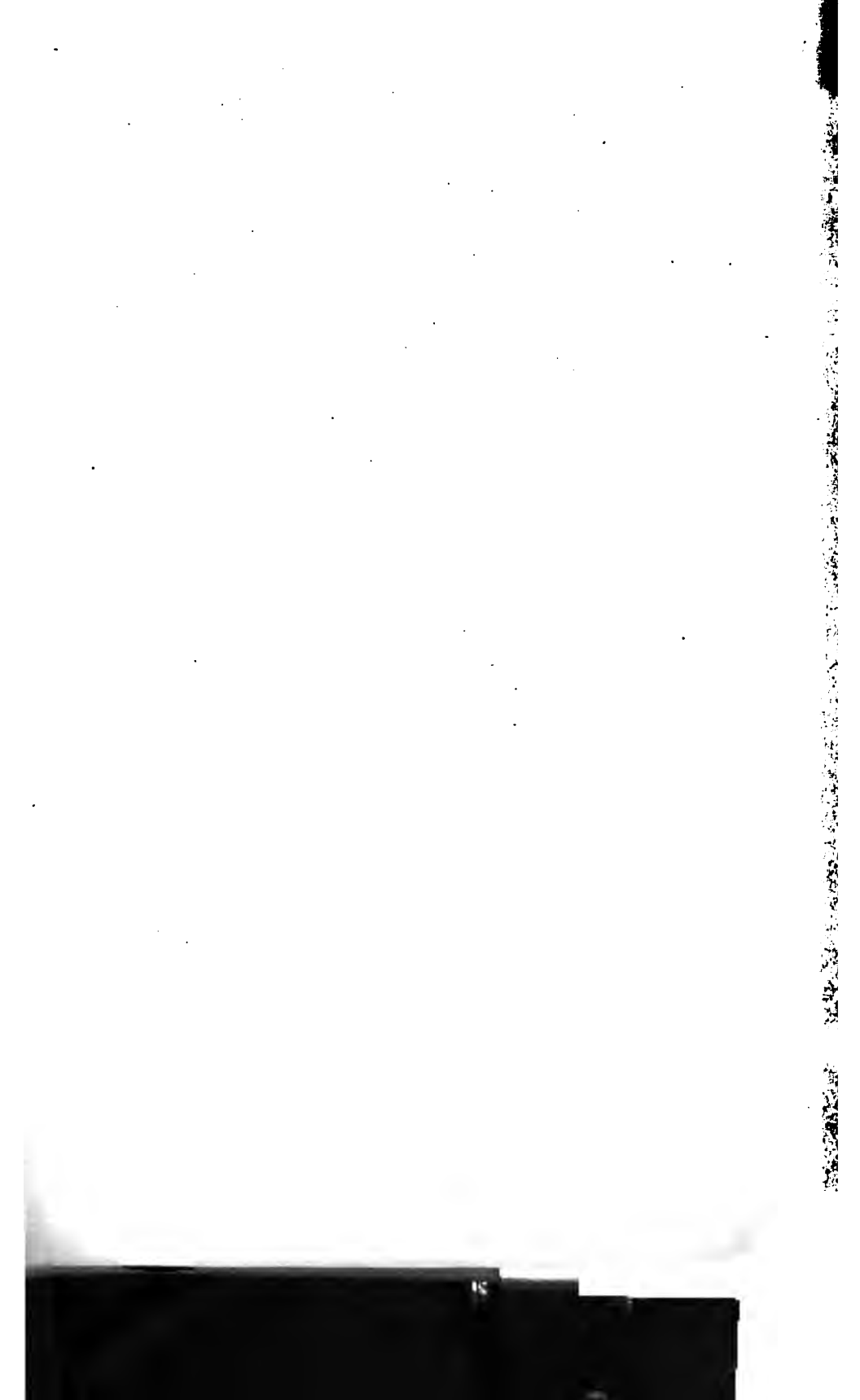
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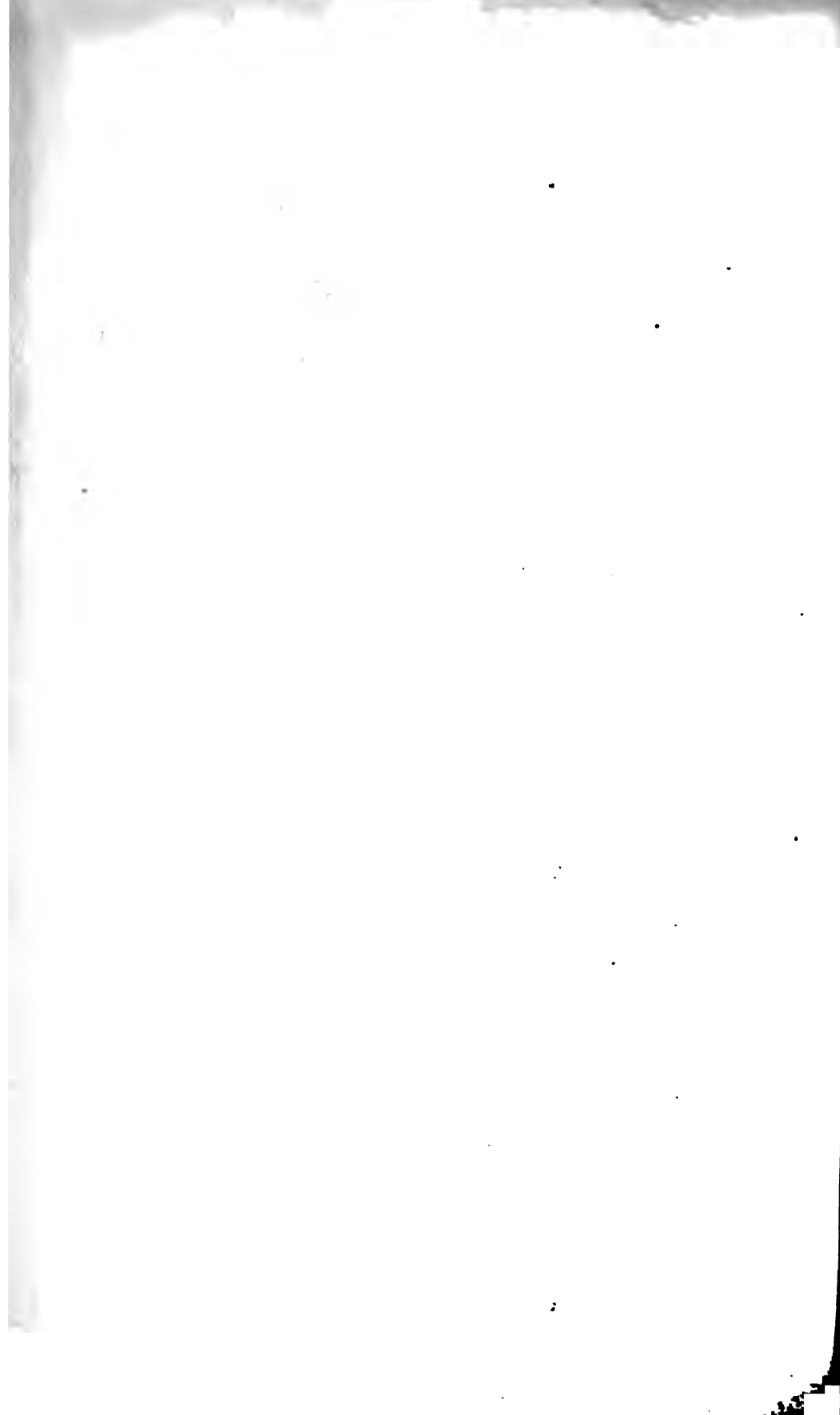
1. When cannot show insurers have paid for property and when liable to insurers. 576 *note*.











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